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Supreme Court of the United States

October Term, 1963

No. 609

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

against

AMERICAN AIRLINES, INC.,

Respondent,

and

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC.; and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Respondents,

and

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1963

No.

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

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Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Charles H. Ruby, as President of the Air Line Pilots Association, International and Air Line Pilots Association, International, an unincorporated association, respectfully

pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on September 16, 1963.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit dated September 16, 1963 is not yet officially reported and appears unofficially at 48 CCH Lab. Cas., Par. 18,476. It is set forth in full at Appendix 2a-18a. The opinions of the United States District Court for the Southern District of New York denying the petitioners' motion for a preliminary injunction and granting summary judgment to the respondents dismissing the complaint for lack of jurisdiction over the subject matter are not yet officially reported and appear unofficially at 48 CCH Lab. Cas. Par. 18,438 and Par. 18,439. These opinions are set forth in full at Appendix 21a-84a.

Jurisdiction

The decree sought to be reviewed herein was dated and entered in the United States Court of Appeals for the Second Circuit on September 16, 1963, and is found at Appendix 19a-20a. The jurisdiction of this Court to review that decree by writ of certiorari is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Is the Federal Court without jurisdiction to protect employees' rights under Section 2 Third and Fourth of the Railway Labor Act against violations consisting of the employer's refusal to bargain with the incumbent union, unlawful interference, assistance and coercion in the selec-

tion of a representative, and has the National Mediation Board exclusive jurisdiction over such matters, where the Federal Court action, commenced prior to any proceeding in the National Mediation Board, sought to require the employer to bargain with the incumbent at a time when there was no substantial representation question, to enjoin the employer from dealing with an unauthorized employee committee and from dealing with a rival organization later formed by such Committee at a time when a representation dispute existed and an election proceeding was pending before the Board, and notwithstanding that the only remedy the Board can provide is to order or withhold the conduct of an election?

II. Does an employer violate Sections 2, Third and 2, Fourth of the Railway Labor Act by refusing to continue negotiations previously commenced with the incumbent, by negotiating instead with a committee of its individual employees who thereafter use the agreement produced by such negotiations to develop employee support for a rival organization thereafter created by them, and by concluding with that rival the agreement so negotiated while a proceeding to resolve the representation question, to which both organizations are parties, is pending and unresolved before the National Mediation Board?

Statute Involved

The statute involved is the Railway Labor Act, 45 U. S. C. §§ 151-188, and particularly §§ 2 Third, 2 Fourth and 2 Ninth of the Railway Labor Act, 45 U. S. C. §§ 152 Third, 152 Fourth and 152 Ninth. The full text of these provisions is set forth at Appendix 97a-99a.

The Importance of the Issues Presented and the Necessity for Review

This action comes before the Court following determinations in the Court below, in a companion action and by the National Mediation Board which, taken together, have established that

1. There is no remedy available for interference, coercion and assistance which violates the Railway Labor Act unless that unlawful conduct occurs during the actual holding of a representation election, and

2. No duty is imposed by the Railway Labor Act upon an employer (a) to deal only with the true representative of his employees, and (b) to remain absolutely neutral when rival representation claims present a substantial representation dispute affecting his employees, or, if such duty is imposed, it is not judicially enforceable.

There is manifest conflict and confusion as among the Federal courts concerning Federal jurisdiction and the function of the National Mediation Board where interference occurs prior to the actual conduct of a representation election under Section 2, Ninth. There is startling inconsistency in the Board's concept of its own proper function and jurisdiction within the perimeter of this case and as well when viewed against other comparable proceedings. The total effect is to leave the ball in mid field. In this case the Petitioner has been assured by the National Mediation Board and the Court respectively that the other has ample power and jurisdiction to deal with the violations. The vindication of representation rights of the Petitioner and other employee groups should not be left to such ambiguous, contradictory and ineffectual assurances.

The second above stated proposition runs counter to the established structure prohibiting an employer from extending preferred treatment to one of two rival representing groups.

Statement of the Case

I. Conflict between the Courts and the National Mediation Board on jurisdiction, and the inconsistent position of the Board.

The issues raised by the complaint in this action relate to interference, assistance and coercion practiced in advance of the holding of a representation election, and which affected employees in the exercise of their Railway Labor Act right to select representatives of their own choosing. The Courts below had jurisdiction to deal with these issues pursuant to 28 U. S. C. § 1331 and § 1337, since they arise under Sections 2 Third, 2 Fourth and 2 Ninth of the Railway Labor Act, 45 U. S. C. § 152 Third, Fourth and Ninth. The Courts below determined that the subject matter of this action falls within the exclusive jurisdiction of the National Mediation Board, and that the federal courts therefore lack jurisdiction over the issues which have been raised.

Petitioner ("ALPA") asked the National Mediation Board to defer its representation proceeding while awaiting decision of the Federal Court in the pending action involving interference, coercion and assistance. The Board refused to do this. Therefore, alternatively, the subject matter of this action was submitted by Petitioner ("ALPA") for decision by the National Mediation Board in May and June, 1963, after the Allied Pilots Association, a rival representing group, had applied to the Board for certification as the representative of the affected employees.

In response to ALPA's submission, the Board took the position that it lacked jurisdiction to take cognizance of and deal with issues of interference, coercion and assistance unless such conduct is shown to have occurred during the actual holding of an election, and that, though it took no position on the merits of the issues raised by ALPA, there had nevertheless been no showing which warranted the deferral of a representation election.

The Board ignored ALPA's protests that no election should be held until the issues of interference, coercion and assistance affecting the selection of representatives by the pilots and copilots of American had been fully aired out and resolved, and a remedy provided for any unlawful conduct which may, as a result, be found to have occurred. Its decision to hold an election came before a decision had issued from the District Court in this action, though the taking of evidence and the submission of briefs by that Court had theretofore been completed.

When the Board established June 21, 1963 as the date for its election, ALPA, on June 16, 1963, commenced an action against the Board in the United States District Court for the District of Columbia, seeking an order enjoining the Board from holding a representation election before there had been a final determination on the unresolved issues of coercion, interference and assistance affecting the representation rights of the employees involved.

In the course of proceedings before the Board, before the Courts in the District of Columbia and before the Court below, the Board took the following positions concerning its own function and duties:

A. Before the District Court for the District of Columbia, the Board argued that it had no authority to deal with the issues which ALPA had raised.

1. Thomas A. Tracy, Assistant Executive Secretary of the Board, stated, in an affidavit submitted to that Court:

> "It has been the consistent position of the National Mediation Board since its creation under the 1934 amendments to the Railway Labor Act, that this *Board has no legal authority to investigate and pass upon charges of carrier interference, assistance, influence and coercion in connection with the representation of carrier employees*, except to take the necessary steps to see that the actual election procedures shall be free from such actions by the Carrier." (emphasis supplied) (P. App. 163).*

2. The Board argued that its authority under the statute was limited. It said:

> "It is undisputed that in arranging to hold the election by secret ballot the Board is discharging a duty specifically imposed upon it by Section 2, Ninth (45 U. S. C. 152, Ninth) of the Act. Since the election has not been held there can, of course, be no charge that there was any interference, influence, or coercion exercised by the carrier in the conduct of the election and it is the duty of the Board to conduct the election in such a manner as to ensure that it will be without interference, influence, or coercion. Clearly, therefore, plaintiffs seek to enjoin the Board from proceeding with the election upon the ground that the Board will be incapable of holding the election as required by statute. (Board's Memorandum in Opposition to Motion for Preliminary Injunction, p. 9).

> "The International contends that it is seeking no more than to compel the Board to perform its duty. *But the statute does not make it the duty of the Mediation Board to investigate charges of employer inter-*

* Refers to page 163 of the appendix for Petitioners (appellants below) in the Court of Appeals. Such references should be distinguished from the reference to "Appendix" followed by page numbers, which refers to the appendix to this Petition.

ference." (emphasis supplied) (Board's Memorandum in Opposition to Motion for Summary Judgment, p. 16).

3. The Board firmly took the position in that action that the District Court in New York then sitting in this action had jurisdiction to deal with such matters, and that ALPA had, by commencing this action, invoked the proper remedy:

> "The Court: One question I would like to ask as you go along. This question I put to you might be incorporated as number 4. What remedy does this union or any union have under the Railway Labor Act when a carrier is interfering with its status as a bargaining representative? What is the remedy?
>
> "Mr. Shapiro [attorney for the Board]: The remedy which is available to a union under the Railroad Labor Act, your Honor, is the remedy which the Union invoked in the Southern District of New York, if it believes a carrier is interfering with its rights to employees, it can bring suit to restrain such an interference.
>
> That is the thrust of the system federation No. 40 against the Virginia Railway System which is cited at length in the Switchmens Union case. *Its relief is in court. That in our judgment is the only forum which can give direct relief on the subject.*" (emphasis supplied) (Transcript of Argument, August 2, 1963, p. 51).

> The Court: Let me ask you this? This is just a hypothetical question. Probably it doesn't have any bearing on what we are talking about here. Suppose the company for reasons of its own does not like a certain international union, and wants to get out of that union. And some of the officers take it upon themselves to try to promote a new union, get certain employees interested in a new group for the purpose of being the bargaining representative. They are successful in getting a majority of the employees to go along with this new union through acts of coercion, influence, promises, and so forth, and what have you?

If that situation would arise? The next question would be, what could be done about it? What could International do about it? They have influenced these people to get out of the union of International and join a new union. I do not know whether that is in this picture or not. But the point is if that did occur, and you would have so-called acts of interference, collusion, coercion, call it what you will. What would be the remedy of the principal union who had been looking out for the rights and interests for these people for many years. Under that situation could they come into court or could they go to the board and say, I want you to investigate these charges before you permit this election take place?

Mr. Shapiro: Well, if the union has been flagrantly organized by the company, the employees go along because they are told if you don't join there will be threats—

The Court: If you don't do this, we will do that.

Mr. Shapiro: Up to that point the Board has no jurisdiction. The old union could go to the Board and say, look what he has been doing.

The Court: Well supposing the company wants to get out of International and gets a majority vote of the employees to go along?

Mr. Shapiro: To get the majority to go along? The Board still has no jurisdiction at this point. *If the old union came into the Board and said, look, be careful, things are happening. All that the Board could do is to say you must go to the District Court and file an action under the act to restrain the company, this new organization.* (emphasis supplied)

The Court: That is what was done in New York?

Mr. Shapiro: That was noi [sic] done in New York. Whatever the merits of that claim are *there is no question but that they selected the right venue up there. But they couldn't come down to the Board and say do something about it. The Board has no no power as I stated.*" (emphasis supplied) (ibid at 78)

B. In the course of the District of Columbia litigation, the Board somewhat altered its view of its own authority.

and claimed that it could assert or reject jurisdiction over such issues in the exercise of its own absolute discretion:

> "Now let us take it a step further. This company created, financed, and supported a union, filed a petition with the National Mediation Board to conduct an election among its employees. The Board would then, I suppose, use its discretion on the basis of the charges to determine whether it should consider these more thoroughly. It might do what was done in the WES Chapter case and conduct a hearing.
>
> The Court: Then you concede it could be done at a hearing?
>
> Mr. Shapiro: Oh, it has conducted hearings, your Honor.
>
> . . . .
>
> Mr. Shapiro: Do [sic] indicate that ALPA lost its majority status as a result of this unfair conduct. This obviously would have been tainted in that sense. Then I think the Board would properly, in its discretion, entertain its petition. But this is a matter of what the Board can do. ALPA here is demanding relief on the Board on the basis of what the Board must do as a matter of clear statutory duty. I do not think this statute is so clear with respect to what the Board has done. Anyone can say the Board violated the statute." (Ibid at 80, 81)

C. In its brief *amicus curiae* submitted to the Court below, however, the Board took a wholly new and inconsistent position, stating that:

> "The Board would not, of course, conduct an election among employees in a case in which it determined that one of the unions involved was company dominated and controlled. In this case, in which Board members were personally familiar with the history of the negotiations, the schism within ALPA, and the charges raised in the instant litigation, the Board concluded that Allied is not company dominated and that further investigation, including a hearing is unnecessary. These conclusions are implicit in its holding that an election can be held with-

out carrier interference." (Board's brief *amicus curiae* at page 8.)

D. Yet in bewildering fashion, concerning the merits of this action, the Board advised the District Court for the District of Columbia that:

> "The Board of course, takes no position on the merits of the New York litigation." (Board's Memorandum in Opposition to Motion for Summary Judgment, p. 19).

The Board had previously acknowledged that it took no position on the merits of the issues which ALPA had submitted to it, and which it had rejected.

In contrast to the positions of the Board, the Courts which have dealt with the issue of jurisdiction involved here have reached other and differing conclusions:

A. The District Court for the Southern District of New York dismissed the complaint in this action, concluding that the federal courts lack jurisdiction over its subject matter. It stated:

> "The argument for ALPA is that there are issues here beyond the identity of the representative; that there has been influence and coercion by the Company in the choice by pilots of their representative, in violation of the Act, specifically Section 2, Third and Fourth (45 U. S. C. A. § 152, Third and Fourth); that the Company assisted in the formation of Allied, in violation of Section 2, Fourth of the Act (45 U. S. C. A. § 152, Fourth); that the effects of these violations continue; and that the Company should be prevented by this Court from securing any benefit from the alleged violations. The logical consequence of such an argument is that the Court should disqualify Allied as a possible representative, even though it might have the support of a majority of the pilots. The Court, according to Alpa, has such jurisdiction 'independent of the National Mediation Board'.

"Apparently Alpa would agree that NMB has exclusive jurisdiction where the issue is simply to decide which of two rivals has majority support. But where violations of the Act—influence, coercion, assistance—are alleged, Alpa argues that this Court has an independent jurisdiction. At least under the conditions here present, I cannot agree.

"The existence and effect of unlawful influence, coercion and assistance seem inseparable from all other matters to be determined by NMB under Section 2, Ninth of the Act. After all, what Alpa is saying in effect is that because of influence, coercion and assistance by the Company, Allied (even though it might have majority support) cannot replace Alpa as the 'true representative'. This is the very question which Congress has committed to NMB, and not to the courts." (Appendix 15a-16a.)

B. The Court of Appeals for the Second Circuit, affirming the result reached by the District Court, found:

"Appellants argue that if the District Court had 'jurisdiction' when the suit was filed in March, before Allied even existed, this could not have been lost because the Mediation Board concluded in May that there was a representation dispute between ALPA and Allied and that the latter was not disqualified. But it had become apparent, long before Allied's application to the Mediation Board, that this action was subject to the vice that it sought orders from a federal court that might frustrate ultimate determination by the agency to which Congress gave exclusive responsibility: the action should have been dismissed as soon as this appeared." (Appendix 17a-18a.)

C. Finally, the District Court for the District of Columbia, recognizing the predicament into which ALPA had been placed by reason of the conflict between the Courts and the Board, stated:

"The Court notes, however, that the New York Court ruled that the National Mediation Board has

exclusive jurisdiction over the question of company interference. But, the National Mediation Board has stated that they have no jurisdiction in this case to pass upon any alleged issues of interference that are committed prior to the conduct of the election.

"Thus, we have a situation in which the complaining party, ALPA, has no forum for hearing or redress if the wrong did, in fact, occur." (Appendix 94a-95a.)

II. ALPA's status as recognized collective bargaining representative of pilots.

ALPA has been collective bargaining representative of the pilots and copilots of American Airlines since 1939, and since that date approximately 90 collective agreements covering rules, rates of pay and working conditions of these employees have been concluded between American and ALPA, by its President (P. App. 95). The most recent agreement was effective January 21, 1959 until June 1, 1961. Shortly before June 1961, negotiations leading to a new agreement were commenced between American and ALPA, and these negotiations continued through December 1962 with no question concerning ALPA's continuing status as representative. In the course of those negotiations, a contractual provision setting forth American's continuing recognition of ALPA as the collective bargaining representative of its pilots and copilots was initialed, agreed upon, and placed to one side.

III. The development of a disagreement within ALPA.

During negotiations, American sought ALPA's agreement to a reduction in the size of the crew on its jet aircraft from four to three men. ALPA's position was that such reduction should be accomplished only in accordance with the published findings of the President's Commission

on the Airlines Controversy, a Board of Arbitration award, several Presidential Emergency Boards and ALPA's own policy, all of which were directly concerned with the crewing of jet aircraft. These findings prescribe that flight engineers serving as third crew members in a three man jet crew should possess, in addition to the normal flight engineer qualifications, a commercial pilot's license and an instrument rating.

During negotiations in 1962, American advised that it would not provice such additional training and qualifications for the flight engineers without withholding from the pilots certain unrelated benefits, principally a reduction in monthly maximum hours, which it appeared otherwise willing to extend (P. App. 79). The pilot Negotiating Committee, attending negotiations with the ALPA representative, responded by urging ALPA to abandon its demand for pilot qualifications for the third crew member on jet aircraft, and to agree instead that a flight engineer without the prescribed training and qualifications might serve as third crew member in the three man jet crew. ALPA's abandonment of pilot training and qualifications for the flight engineers would, in the opinion of the Committee, have facilitated the negotiation of an agreement containing the other benefits which they sought. Then and now all air carriers operating jet equipment with a three man crew do so with a third crew member possessing at least a commercial pilot's license and an instrument rating, in addition to flight engineer qualifications.

ALPA, not in agreement with the Committee on this issue, directed that bargaining proceed with the object of securing pilot training and qualifications for the third crew member, in accordance with the foregoing public findings and recommendations and with the provisions of

ALPA's Constitution and By-Laws and policy, which had theretofore been duly adopted by the elected representatives of all pilots, including those of American.

IV. The function and authority of the MEC and Negotiating Committee within ALPA's structure.

There are no autonomous or semi-autonomous groups within ALPA's structure. ALPA, and not any subordinate or affiliated group, is the bargaining representative of more than 14,000 pilots, employed by all scheduled airlines in the United States.

The structure of the Air Line Pilots Association, International, is centralized; there are no "locals" or other autonomous subdivisions (P. App. 79). The basic internal units of ALPA's structure are Local Councils, each of which is composed of members employed by the same air line at a particular base. The Local Councils elect representatives to a Master Executive Council, the "MEC", for each air line. The ALPA Executive Board is composed of the MEC Chairman and another representative of each Master Executive Council. Each Local Council is represented on the Board of Directors which convenes bi-annually and is the highest governing body of ALPA. At meetings of the Board of Directors, the pilot group on each carrier has a voice on all matters, including policy, with the voting strength of each such group directly proportional to the members in good standing on their airline. The nine national officers of ALPA, elected by all the air line groups, constitute its Executive Committee which, together with the President, is charged with the implementation of policy declared by the Board of Directors.

Controlling principles concerning collective bargaining are set forth in ALPA's Constitution and By-Laws and in

its policy manual. Article XVIII of the Constitution and By-Laws provides as follows:

> "*Conferences or negotiations shall not* be initiated, *carried on*, or *concluded* in the name *of the Association by any member, group* or *groups of members thereof to make or establish employment agreements relating to rates of pay, rules*, or other conditions of employment, or any other agreements, contracts, or documents of a similar or related character, or any other form of agreements, contracts or documents *without the prior approval of the Executive Committee*, or the *President*. Any and *all agreements*, contracts, or documents of any and every character whatsoever *shall not become effective*, binding or operative *unless and until they bear the signature* of the *President* or other officer or officers duly authorized so to sign by the Board of Directors, Executive Board, or Executive Committee." (Emphasis supplied.) (P. App. 149 at p. 65)

All disputes which arise within the Association during the course of negotiations are, pursuant to Association policy, referable to the Executive Committee, which has authority to finally resolve such disputes. The ALPA Policy Manual provides:

> "If during negotiations, any unreconcilable controversies arise between a negotiating committee or a Master Executive Council and the Home Office, such controversies shall be referred to the Executive Committee for final disposition."

The Constitution and By-Laws plainly set forth the duty of the Master Executive Council and of its chairman on a particular airline to act in a manner consistent with the Constitution and By-Laws, policies and objectives of ALPA.

> "* * * nothing in this Section shall authorize any Master Executive Council to request any action that

is inconsistent with this Constitution and By-Laws or with the best interests of the Association or the general membership thereof." (P. App. 149 at p. 25)

"The Master Chairman shall be * * * the Association representative on his airline for the purpose of furthering and implementing the objectives and policies announced by the Board of Directors, the Executive Board and Executive Committee * * *." (*id.*)

The American pilots, as well as other groups, had voted for an MEC and Negotiating Committee to function within this and no other framework.

V. American's refusal to deal with ALPA, and its dealings with a rival group while ALPA continued to assert its representative status.

When efforts were unsuccessful in resolving the disagreement between ALPA and the Negotiating Committee, ALPA recessed the negotitations late in November, 1962, and recalled its representative (P. App. 107). Despite the recess and the absence of an ALPA representative, American, on December 1, 1962, caused to be prepared and initialed by its representatives and members of the Negotiating Committee a document purporting to be an agreement between ALPA and American that a reduction in American's jet crew from four to three men might proceed without pilot training or qualifications for the third crew member. Flight engineer representatives present also initialed this document, which was referred to below as the "December 1 Crew Complement Document". The existence and contents of this document did not become known to ALPA until several months thereafter (P. App. 73-75).

On January 8, 1963, with negotiations still in recess, the American Master Executive Council (MEC) met and, purporting to speak "for the entire AAL pilot group," adopted a resolution reciting that it authorized

"the American Airlines Negotiating Committee to conclude a contract and further to advise AAL man-

> **agement that the AAL pilots are agreeable to implementation of said contract with or without formal approval of the ALPA. * * * "**

The full text of this resolution is set forth at Appendix 102a-103a.

On January 16, 1963, Nicholas J. O'Connell, Jr., Chairman of the MEC, an *ex officio* member of the Negotiating Committee, and later to become the President of the Allied Pilots Association upon its creation over two months later, advised William B. Whitacre, American's Vice-President of Personnel, of the foregoing resolution and stated that:

> **" * * * It was the unanimous concurrence of the MEC that they had the full backing of the entire pilot group * * * "**

On the basis of such representations, O'Connell, in January, 1963, asked American to negotiate with his Committee notwithstanding ALPA's objections and its continuing claim to representative status, and to conclude an agreement with his Committee, promising that the agreement ultimately reached would meet with "unanimous approval * * * by the MEC and ratification by 75 percent of the group. * * * " (P. App. 88-90).

In response to O'Connell's request, American manifested an intention to conclude an agreement, and proceeded to encourage the Committee to do so even though the result would be a separation of the pilots from ALPA and the formation of a new organization. American accomplished this objective by the use of at least four separate devices:

1. It conceived and prepared substitute pages for those pages of the December 1 Crew Complement document which referred to ALPA as the pilots' representatives and as the contracting party. American's substitute pages referred not to ALPA but instead to an unknown and unnamed bargaining representative to be identified at some later

time. According to the testimony of American's Vice-President they were conceived and prepared either in December 1962 or January 1963, even before O'Connell himself had expressed a willingness to consider the formation of a separate organization, or to separate the pilots from ALPA (P. App. 137).

The December 1 crew complement document as modified by these substituted pages was referred to by American as the "modified crew complement document". Early in February 1963, American, according to its own negotiating notes, urged the completion of an agreement covering the pilots on the basis of the so- alled modified crew complement document, whether or not ALPA ultimately would be a "party thereto" (P. App. 148jj, 148kk, 148ll).

2. On January 4, 1963, O'Connell requested, and Whitacre provided a letter rejecting ALPA's position on crew complement. Such a letter had been sought by O'Connell for use in relation to the disagreement between the Negotiating Committee and ALPA. O'Connell rejected Whitacre's proposed letter on January 4, however, claiming that it "* * * didn't give him enough support to do him any good, and if this was the best letter I could give him, why just * * * throw it away. * * *" (P. App. 82).

3. In mid-January 1963, American agreed to consider payment of wages to the members of the Negotiating Committee for time spent in negotiations, if the pilots ultimately separated from ALPA (P. App. 91-92).

VI. The absence of evidence that the pilots supported O'Connell's group.

In support of the Committee's request in January 1963 that American engage in separate negotiations with it, the only indication of authority which the Committee tendered to American was the resolution adopted by the MEC on

January 8, 1963 (P. App. 90). This resolution was conceived and adopted by persons holding office within ALPA, having been elected by the pilots solely to function within the Constitution and By-Laws of ALPA (P. App. 77). As of January 1963, and for several months thereafter, there was no indication by the pilot group that it desired the formation of a representing organization other than ALPA, that it authorized the conduct of separate negotiations with American, that it approved the conduct of the O'Connell Committee, or that it no longer supported ALPA.

Shortly after the commencement of this action, American moved the District Court for an order directing the appointment of a Special Master to decide

> "* * * whether a majority of defendant's flight deck employees desire to continue to be represented for the purpose of concluding an agreement by the Joint Negotiating Committee."

An agreement was concluded, executed, and implemented between American and O'Connell's Committee—Allied before American's motion for a Special Master was decided; indeed, that agreement was concluded, executed and implemented after the commencement of this action, but before any of the issues which were raised had been decided by the District Court.

Shortly after this action was commenced, O'Connell's Committee disavowed any "intention of asserting any continuing right to * * * [representative] status." Instead, they created the Allied Pilots Association on March 21, 1963, three weeks after the commencement of this action, and about one week after an agreement had been reached in the negotiations between American and the O'Connell group (P. App. 70-71).[*] Allied's stated purpose was to become certified by the National Mediation Board as the representa-

tive of American's pilots. Allied was created at a meeting of the MEC, the same MEC which had conceived and adopted the MEC resolution of January 8, 1963. The MEC meeting at which Allied was created was called for the announced purpose of ratifying the March 15 agreement (P. App. 70-71). . . ."

On April 24, 1963, Allied petitioned the National Mediation Board for certification as representative of American's pilots and copilots under Section 2, Ninth of the Railway Labor Act. A true copy of that petition is set forth at Appendix 103a-104a. In its petition, Allied stated that:

> "A dispute has arisen among the employees of American Airlines, Inc. as to who are the representatives of these employees. . . ."

and that Allied and ALPA are parties to that dispute.

On July 9, 1963, before any determination had been made by the District Court in this action or by the National Mediation Board on Allied's petition, American and Allied executed and placed into effect the March 15 agreement which had been negotiated by American and the O'Connell Committee. This agreement, as American and Allied stated, was executed by them solely because the District Court for the District of Columbia had, after full hearing the parties, enjoined the Board from holding the representation election sought by Allied.

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* The negotiations between January 1 to March 15 were attended by a representative of that Board and often by its Chairman, who is reported to have urged American, in January 1963, to accede to O'Connell's request for separate negotiations with his group despite ALPA's protest.

VII. Negotiation of an agreement with a bargaining representative to be formed and identified later.

Following the conclusion of the negotiation of the March 15 agreement between American and his committee, O'Connell stated:

> "The Company has committed themselves to the fact that they have an agreed-to amended basic working agreement with related documents that they will honor and put into effect at such time as there can be produced a person with the satisfactory credentials to sign the documents." (P. App. 78)

An unusual circumstance was presented by the negotiations between the Committee and American. During January and February, 1963, no bargaining representative recognized by either of them as valid was in existence; yet they nevertheless proceeded to bargain an agreement and then to "fashion" a "representative" which would be agreeable to the deal.

A. The Formation of a Separate Representing Organization.

Prior to the creation of the Allied Pilots Association on March 21, 1963, Whitacre, American's Vice-President, advised the O'Connell Committee that the agreement of March 15, containing benefits which they sought, could not be implemented until a formal and responsible representing organization had been formed; since American

> "* * * would need assurance that we were dealing with a responsible organization and formally organized group, so that they would be responsible. We would need to know the names of officials and council chairmen, and probably counsel, and members of things like system board of adjustments, and things of that sort, and that is about as far as I expanded my explanation of what we needed, and one of the visiting members said, 'We understand what you mean, and I don't think there will be any question but what we will have a responsible organization * * *'"

Whitacre testified that he repeatedly advised the pilots of American's concern for the formation of a responsible organization:

> "A. * * * I have had occasion eight or ten times to tell both the pilots and the engineers that if ALPA didn't accept this contract that the company couldn't do business with any group unless they were represented by a formal and responsible organization."

On February 26, 1963, more than three weeks before Allied was formed, and only six days after American, by withdrawing its proposed substitute pages, reverted to the position that ALPA represented the pilots, Whitacre stated:

> "The Witness: This is what I was explaining, that the pilots would have to have a formal organization before the company could even sign with them or implement or do any business at all.
>
> Q. Did you explain at that meeting what you meant by a formal organization? A. I think I did, yes, sir.
>
> Q. Will you tell us what you then said? A. I think I said that they would have to go through the formality of determining a bargaining representative, that they would have to have an address, attorney, counsel, chairman and so forth."

B. American's Acknowledgement That the Separate Negotiations Had Produced Support for a Separate Representative.

A meeting was held on January 30, 1963 at American's offices, attended by representatives of ALPA and American, and called at ALPA's request in an attempt to bring about a cessation of separate negotiations. There, Whitacre stated that in his view, the benefits contained in the agreement then being negotiated with the O'Connell committee would produce almost unanimous support for that committee from the pilot group:

> "Mr. Weiss, I believe, about this time, or a little later, addressed a statement to me and said 'Don't

you know that this has been a real rough committee over the years and the pilots on American Airlines have never completely supported this committee.' and I said, 'Yes, Mr. Weiss, four years ago I would have said this was true, or two years ago it was probably true, but there is something you don't understand about the situation now; since the proposal in July and the news of this solution of guaranteed employment for the second officers, reduction in hours for all flight crew members and improved working conditions, which is what the American pilots have always tried to negotiate, in my opinion, 100 percent, or very near 100 percent, of the pilots on American Airlines will completely support this committee'." (P. App. 86)

REASONS FOR GRANTING THE WRIT

POINT I

The Court below erred in finding that the federal courts lack jurisdiction to deal with the issues raised by the complaint.

The decision in the Court below, viewed with decisions in companion matters now pending before the National Mediation Board and the Court of Appeals for the District of Columbia, appears to establish that substantial mandates of the Railway Labor Act may not be judicially enforceable.

The complaint in this action raises issues relating to interference, assistance and coercion practiced in advance of the actual conduct of a representation election by the Mediation Board, but which nevertheless affect the right of employees, under Section 2, Third and Fourth of the Act, to select a collective bargaining representative of their own choosing in an atmosphere which is not polluted by the continuing effects of unlawful pressures.

The Court below found that it lacked jurisdiction over such matters and that exclusive jurisdiction to deal with these issues is vested in the National Mediation Board.

The Mediation Board took the opposite view; it determined that ALPA had properly invoked the jurisdiction of the federal courts in this action. It advised the District of Columbia Court that the Board

> "has no legal authority to investigate and pass upon charges of carrier interference, assistance, influence and coercion in connection with representation of carrier employees, except to take the necessary steps to see that the actual election procedures shall be free from such actions by the Carrier."

In the District Court for the District of Columbia, Judge Walsh noted that

> "• • • the New York Court ruled that the National Mediation Board has exclusive jurisdiction over the question of company interference. But the National Mediation Board has stated that they have no jurisdiction in this case to pass upon any alleged issues of interference that are committed prior to the conduct of the election." (Appendix 94a.)

To date, every forum in which ALPA has sought a determination on the merits of these issues of interference, coercion and assistance has deemed itself to be without jurisdiction to deal with such matters. Every such forum has found that exclusive jurisdiction over such issues resides elsewhere. While there appears to be little doubt that such issues are justiciable somewhere, they have not yet been ruled upon in a forum which regards itself as competent.

When Allied, the alleged beneficiary of American's assistance, petitioned the Mediation Board for an election,* ALPA asked that the Board (1) defer its election processes until the final determination of the issues raised in this action or, if it should refuse to do so, that it (2) take cognizance of and itself deal with the merits of such issues before proceeding to an election and certification. After an investigation by one of its mediators in which no testimony was taken, no hearing held, and no opportunity to present evidence extended, the Board rejected ALPA's request in its entirety. Though it acknowledged that it had not passed upon the issues of interference, assistance and coercion, and that it took no position on the merits of this action, the Mediation Board nevertheless determined to proceed quickly to an election.

The Court of Appeals below refused to accept the Board's own unchallenged view that its processing of Allied's petition did not result in a determination on the merits of the issues raised in this action. Instead, it concluded that the Mediation Board had made a determination on the merits of the issues in this action, and it apparently viewed this action as a request for judicial review of the Board's findings.

> * * * The Board performed its duty. True, no testimony was taken, as it was in the WES case, but the Board's manner of investigation was not only as good but better under the circumstances. As we are told by an affidavit of its Assistant Executive Secretary, it utilized pleadings, exhibits, and portions of the record already made in this action, which each of the three members reviewed. In addition it had the important benefit of its own intimate knowledge

* Allied's petition was filed on April 24, 1963, after the commencement of this action, and after most of the conduct complained of had occurred, but before a decision by the District Court.

of the negotiations, derived from the participation of its representatives therein. ALPA has told us of no additional material facts it would have presented if the Board had given it a further opportunity; its complaint relates not so much to the adequacy of the information before the Board as to *the Board's conclusion that no wrong had been done.* We see no more basis for judicial interference with that conclusion than with the conclusion in the Switchmen's case that the New York Central's Yardmen should vote on a system-wide basis." (Emphasis supplied.) (Appendix 15a).

Thus, the Court below has found that a conclusive determination of the merits in this action resulted from a Mediation Board investigation, an investigation which, by the Board's own statement, it had no jurisdiction to engage upon, and one which, as the Board has twice acknowledged, did not result in a determination on the merits of the issues of interference, assistance and coercion.

The Board has never concluded that "no wrong has been done". Even the most liberal construction of the Board's brief *amicus curiae* to the Court below, in which it reversed the position which it had theretofore consistently argued, and from which the Court below apparently drew facts concerning the Board's investigation, does not support such a conclusion. There, the Board stated:

> "* * * the Board concluded that Allied is not company dominated and that further investigation, including a hearing, is unnecessary."

The complaint in this action is not limited to a charge of domination. And a finding of company domination is not indispensable to a finding that unlawful interference with employee representation rights was practiced. *See, eg., Garment Workers* v. *NLRB*, 366 U. S. 731 (1961).

Despite its examination into the procedure followed by the Mediation Board, the Court below did not have before it any issue to which the procedural adequacy of the Board's treatment of the charges of interference, coercion and assistance was material. No such issue was passed upon by the District Court, nor was such an issue raised by the complaint in this action.

There had been no request by the parties to the Court of Appeals that it assume original jurisdiction to evaluate the adequacy of the National Mediation Board's treatment of issues relating to Railway Labor Act violations. The petitioner had drawn the attention of the Court below to the Board's own disclaimer of jurisdiction over such matters. The opinion of the Court of Appeals inexplicably does not give effect to the Board's undisputed statements to the District of Columbia Court concerning the scope of its own inquiry.

Moreover, Judge Walsh in the District Court for the District of Columbia, in an action to which the Board was a party and in which the procedural adequacy of the Board's treatment of these issues was properly an issue, questioned the conclusion that the Mediation Board's investigation was adequate. He stated:

> "Counsel for defendant asserts that the Board has conducted an 'adequate investigation.' It is not clear to this Court what comprises an adequate investigation if the absence of a formal hearing, or when the parties are not accorded the opportunity of presenting evidence of interference." (Appendix 94a-95a.)

The Court below held that *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943) stands as a bar to this action, stating that:

> "a suit to review administrative action usually stands on a better footing than one whose maintenance

would prevent an administrative agency from performing its statutory duty." (Appendix 11a.)

The applicability to this case of the Court's conclusions on review of administrative action is not clear to Petitioner. This is neither a suit to review administrative action nor one seeking to enjoin such action. This is an action seeking a remedy against a carrier and a rival representing group for interference, assistance and coercion in violation of the Railway Labor Act. Considerations relating to judicial review of Mediation Board action were not raised herein by ALPA nor are they material.

The conclusions of the Court below regarding review of administrative action, whatever their materiality in this case, are diametrically opposed to the view of the Court of Appeals for the District of Columbia. There, in an action brought after a Mediation Board certification, seeking a remedy for antecedent interference, assistance and coercion, that Court strongly indicated that it had jurisdiction to act upon the Board's refusal to deal with such issues before the Board had handed down a certification, but not thereafter. It stated:

> "In the present case Conductors had, prior to this controversy, represented road conductors, and Trainmen had represented yard conductors. When the right of the former to continue to represent road conductors was challenged by Trainmen and it was charged that there was collusion between Trainmen and the Railroad, with the purpose of influencing the electors in casting their ballots, we think the Board should have investigated the charge before calling or holding an election. This seems to us to follow from the provisions of the Section of the Act under which the Board is required to function. The Board's justification that jurisdiction to police the election was confined to the event itself, and not the circumstances leading up to it, does not appeal to us. See *Texas & N.O. R.R. Co.* v. *Brotherhood &c.*, 281 U. S.

> 548. But after the election had been held and the majority of the votes had been cast and counted for Trainmen and the Board had certified it as the bargaining representative, the decisions of the Supreme Court in the cases we have referred to, as well as in the Missouri-Kansas and Southern Pacific cases decided the same day, as we understand their purport, foreclose the question we have here and deprive the courts of all rights of interference." *Order of Railway Conductors* v. *National Mediation Board*, 141 F. 2d 366, 367-68 (D.C. Cir. 1944).

And see ALPA's companion action in the District of Columbia, where the District Court, in a decision which cannot be reconciled with the view of the Court below, held that it possessed jurisdiction to enjoin the Mediation Board from conducting an election and issuing a certification, and it issued such an injunction, notwithstanding the Board's opposing arguments, grounded upon *Switchmen's Union*. Though an appeal is now pending from that decision, the error assigned on appeal does not relate to the Court's conclusion that it possessed jurisdiction to enjoin the Board. To the same effect, see also *Association for the Benefit of Non-Contract Employees* v. *National Mediation Board*, D.C. D.C. Civ. No. 973-63 (May 3, 1963).

Though issues relating to the Mediation Board election proceedings have not been raised in this action, it is nevertheless relevant that the Board has, on the basis of the decision herein below, secured an order dissolving the injunction issued against it by the District Court of Columbia Court of Appeals, and is now proceeding to an election and certification even though no decision on the merits of the issues raised has yet been handed down in a forum deeming itself competent to decide such issues. As the Court below acknowledged, the National Labor Relations Board does not hold a representation election before it has finally passed

upon the merits of related unfair labor practice charges (Appendix 12a, note 8). See also, to the same effect:

Mays Dept. Stores, d/b/a Famous Barr Co., 61 N. L. R. B. 258;
Ellis & Watts Products, Inc., Case No. 9-RC-4106 (Administrative Decision of N. L. R. B. 1960);
Borg-Warner Corp., Case No. 8-RC-2154 (Administrative Decision of N. L. R. B. 1955).

Apparently the Mediation Board regards this principle, uniformly followed by the N. L. R. B., to be inapplicable to representation proceedings under the Railway Labor Act.

The foregoing discussion of proceedings in this action, in the District of Columbia action, and before the Board indicates the serious jurisdictional perplexity which has surrounded ALPA's continuing attempts, during more than eight months of litigation, to find a forum in which the issues raised in this action may be resolved. By reason of the inconsistent jurisdictional determinations emanating from the several forums involved,* and because of the absence of a clearly expressed duty upon the Board to respect judicial decisions defining the Board's functions and responsibilities,** no prompt or effective remedy for Railway

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* The Board itself has taken diametrically inconsistent positions as to the scope of its own jurisdiction over such issues on different occasions. Compare the position which it takes in the instant case with that described in *WES Chapter, FEIA* v. *National Mediation Board*, 312 F. 2d 234, 237 (D. C. Cir. 1962).

** In 1944, the Board took the position that it had no jurisdiction to deal with carrier interference, assistance and coercion except where such conduct was practiced during the actual physical holding of an election. In *Order of Railway Conductors* v. *National Mediation Board*, 141 F. 2d 306 (D. C. Cir. 1944), the Court of Appeals for the District of Columbia strongly disapproved of the Board's narrow view of its own jurisdiction. Despite such judicial disapproval, the Board now reiterates, in the District of Columbia action, its 1944 position in language almost precisely identical.

Labor Act violations is available, even if ALPA were able to find a forum which admits to jurisdiction over such matters.

While the complaint in this action does not raise issues relating to the duties or responsibilities of the National Mediation Board, (though the extent of federal court jurisdiction in this area may in part turn upon jurisdictional or remedial limitations upon the Board) this action does raise an issue fundamental to the elimination of all of the jurisdictional confusion which has attended this dispute.

In this action, Petitioner seeks a determination that the federal courts, concurrently with the Board, possess jurisdiction to deal with issues relating to interference, assistance and coercion of employees in the exercise of their Railway Labor Act right to select representatives of their own choosing. As a corollary, Petitioner seeks a determination that it is only in the federal courts that a complete and wholly effective remedy for such violations is available, since the Board is admittedly without authority to issue remedial orders such as those issued in parallel situations by the National Labor Relations Board. The only "remedy" which the Mediation Board can grant is an order directing the holding of an election, or an order refusing to direct the holding of an election.

The federal courts have jurisdiction under the provisions of Title 28 U. S. C. Section 1337 to enforce the duties and obligations set forth in the mandates of the Act. They have done so upon many occasions. See for example,

Texas and N. O. RR. v. Clerks, 281 U. S. 548 (1930);

Virginian Railway v. System Federation # 40, 300 U. S. 515 (1937);

Steele v. Louisville and Nashville Railroad, 323 U. S. 192 (1944);

Tunstall v. *Brotherhood of Firemen*, 323 U. S. 210 (1944);

Railroad Trainmen v. *Chicago River & I. R. R.*, 353 U. S. 30 (1957);

Railroad Yardmasters v. *Pennsylvania Railroad*, 244 F. 2d 226 (3rd Cir. 1955);

Northwest Airlines v. *ALPA*, 185 F. Supp. 77 (D. C. Minn. 1960);

American Airlines v. *ALPA*, 169 F. Supp. 777 (S. D. N. Y. 1958).

The Court below found the *Virginian Railway* decision of this Court inapplicable here despite the identity between the remedy granted in that case (a direction that the carrier bargain collectively with the true representative of its employees, and not with any other) and the principal remedy sought by ALPA in this action.

The Court below agreed that the federal courts possess jurisdiction to

> "require the carrier to bargain with the duly designated representative, *Virginian Ry. Co.* v. *System Federation*, No. 40, 300 U. S. 515, (1937)" (Appendix 13a-14a).

but that Court did not agree that ALPA has stated a claim to which the *Virginian Railway* principle is applicable.

The Court suggested two reasons for its refusal to find *Virginian Railway* applicable here: that unlike the union involved in the *Virginian Railway* case, ALPA owed its incumbent representative status not to a certification of the Mediation Board, but rather to recognition voluntarily conferred by the carrier; and that a substantial representation dispute requiring the intervention of the Mediation Board is presented here, though no such dispute was present in *Virginian Railway*.

A distinction between certification and recognition, as Judge Friendly has heretofore recognized,

> "* * * lacks legal significance."
>
> *NLRB v. Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, 725 (2d Cir. 1961).

And the National Mediation Board has itself stated that:

> "In situations where a carrier's employees are not represented, voluntary recognition extended by such carrier to an organization covering a 'craft' or class of its employees would be considered by the Board as having the same effect as a certification. In the present case the employees concerned were represented by another organization at the time of the so-called system-wide recognition, and were not notified by the Carrier of its intention to recognize another organization, therefore were not afforded an opportunity to protect their rights. In the absence of a legal determination of these issues the Board believes the voluntary representation previously established between the Carrier and the various organizations and associations representing its employees should be considered as effective until changed in accordance with the provisions of Section 2, Ninth, of the Act."
>
> *Matter of Representation of Pan American Airways, Inc.*, 1 Determinations of Craft or Class 381, 386.

Nor does the second distinction suggested between this action and *Virginian Railway* support the decision below. The substantial representation dispute requiring the intervention of the Mediation Board did not come into existence until at least two months after American's January refusal to bargain with ALPA, a refusal which occurred at a time when even the O'Connell Committee did not challenge

ALPA's representative status. The Court below found that such a dispute

> "... became an almost inevitable prospect within a few weeks after this action was brought on March 1 and crystallized into a certainty by late April." (Appendix 14a)

A fortiori, no such dispute existed prior to March.

If there was no substantial representation dispute prior to March, then how were the affected employees represented between January and March, 1963. By the Allied Pilots Association? Plainly not, since that Association was not then in existence. By the O'Connell Committee? Plainly not, since O'Connell denied that his Committee sought to terminate ALPA's representative status at that time. Indeed, O'Connell asked ALPA's president, as late as March 29, 1963, to execute the March 6 agreement, and thus to continue as the pilots' representative. Were the pilots unrepresented between January and March, 1963? Plainly not, since ALPA, the representative of these employees continuously since 1939, continued to administer the provisions of its most recent agreement with American for the benefit of the pilots, while continuing to protest against the separate negotiations then being conducted, and to request that American resume bargaining with it. As the Mediation Board has stated,

> "... the voluntary representation previously established between the Carrier and the various representing its employees should be considered as effective until changed in accordance with the provisions of Section 2, Ninth of the Act." (*Matter of Representation of Pan American Airways, Inc., supra*)

According to the Court below, the presence of a substantial representation question in March and thereafter foreclosed the possibility of a judicial remedy for American's refusal

to bargain with ALPA in January. ***But the Courts below failed to make clear why the existence of that same substantial representation dispute requiring the Board's intervention was not found to be inconsistent with the dealings between American and the O'Connell Committee, or between American and Allied, or with the conclusion, execution and implementation of an agreement between American and one of the rivals before the Mediation Board had provided the intervention found necessary by the Court below.***

Moreover, the District Court found no jurisdictional bar to a grant of injunctive relief in favor of the AA Chapter, FEIA, the flight engineers' representative. Yet that Court itself found that during the operative period, *American claimed that the O'Connell Committee represented flight engineers as well as pilots* (Appendix 79a). The Court does not show why a substantial representation dispute requiring the intervention of the Mediation Board (and depriving the federal courts of jurisdiction to act) was thereby created with respect to the pilots, but not with respect to the flight engineers. A distinction between the AA Chapter, FEIA, as a *certified* representative, and ALPA, *as a recognized* representative is, as shown above, without legal significance.

American's refusal in January to bargain only with ALPA, at a time when ALPA's representative status was not in dispute, makes the analogy between this action and *Virginian Railway* as an exact one. The jurisdiction established by this Court in *Virginian Railway* and found by the District Court to warrant relief to the intervenor should have been asserted below to provide the remedy sought by ALPA.

Moreover, the view of the Court of Appeals overlooks a large and significant area of required judicial action, plainly indicated by the facts of this case. Assuming "a substan-

tial representation dispute" within the cognizance of the National Mediation Board, the very existence of such a dispute makes proper federal jurisdiction to protect the parties while the Board's process is under way, to provide a remedy in aid of the function of that Board, and to prevent the destruction of the subject matter of the representation dispute until that dispute has been resolved by the Board. The complaint herein seeks an order enjoining dealings between the employer and the rival pending the resolution of such dispute in the manner provided by law. Such relief is highly appropriate under these circumstances; only the federal courts can provide such relief.

The legislative history surrounding the adoption of the Railway Labor Act in 1926 shows that Congress intended the Courts to enforce the mandates of the Railway Labor Act. Thus, in the hearings before the House Committee on Interstate and Foreign Commerce on the passage of the Railway Labor Act of 1926, the following statements were made by a framer of the Act concerning the power of the federal courts to enforce the duties imposed upon carriers and labor organizations by that Act:

"Mr. Fredericks: How is that enforced?

"Mr. Richberg: Well, when you say to require, I do not want to say that it compels in the sense of putting a legal force on them. We have avoided in the bill in any way setting up any penalty sections or any sections for the invocation of any judicial authority, except in the enforcement of an arbitration award. The thought being this, that so far as this law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take consistent with the judicial powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. But the law for such enforcement or compulsion should be developed in the courts, according to the old common law theory of letting the courts develop the law

> after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement." (Hearings on H. R. 7180, 69th Cong. 1st Sess. Page 40)

In the *Virginian Railway* case, *supra*, this Court held that the obligation of the employer to deal only with the true representative of its employees and to refrain from dealing with all others is appropriately one to be enforced by the courts. It said:

> "It is, we think not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts." (300 U. S. at 545)

If the federal courts lack jurisdiction to deal with these issues, the only effective means of protecting important individual rights guaranteed by the Act will thereby be eliminated.

The National Mediation Board may deal with charges of unlawful interference, coercion and assistance only under the provisions of Section 2, Ninth of the Act, after its services have been invoked in a representation dispute. Moreover, under Sections 1203.2 and 1206.2 of the Rules of the National Mediation Board (Appendix 99a-101a), its services in a representation proceeding may be invoked only by an applicant who presents authorization-to-act cards signed by at least a majority of the employees in the group affected by the dispute. Consequently, a union has no remedy for unlawful interference, coercion and assistance at the National Mediation Board unless it has the support of a majority of the employees at the time of application to that Board.

If the unlawful interference, coercion and assistance have achieved their intended objective, however, the complaining union may, as a result of such conduct, no longer

have the support of a majority of the employees. It will thus be unable to apply to the National Mediation Board for relief. Under such circumstances, if the organization which has received the benefit of the unlawful conduct chooses not to invoke the Board's services, and if the federal courts have no independent jurisdiction to deal with such interference, coercion and assistance, no effective remedy is available for admitted violations of the Railway Labor Act. It would necessarily follow that a remedy for unlawful interference, coercion and assistance is available at the Board only when there may be no real need for the remedy, that is, when unlawful conduct has not achieved its unlawful objective.

An additional difficulty is inherent in the argument that the federal courts have no jurisdiction of such matters. If the services of the Board in representation proceedings may be invoked only by a union possessing indicia of majority support, the union which has received the benefit of the unlawful interference, coercion and assistance and has thereby achieved majority support would not require the services of the National Mediation Board. Having received recognition from the carrier, certification would be unnecessary. Under such circumstances, the invocation of the Board's services would serve only to furnish the complaining union with a forum, not otherwise available, in which to air these Railway Labor Act violations.

This is not to say that the federal courts have jurisdiction to determine, as between rival groups, who is the true representative of the employees. That is an altogether distinct matter. An effective remedy in the federal courts for interference, coercion and assistance which affected employees in their selection of representatives will not trespass upon the function of the Board under Section 2, Ninth of the Act.

While the National Mediation Board possesses an independent jurisdiction to deal with issues of interference, coercion and assistance, that jurisdiction is of a concurrent nature; to be exercised side by side with the federal courts.

The Board's jurisdiction is predicated upon the language of Section 2, Ninth of the Railway Labor Act, upon judicial decisions, and upon the Board's own acknowledgement in several administrative decisions where it has asserted the jurisdiction which ALPA unsuccessfully sought to invoke.

Section 2, Ninth provides in pertinent part:

> "* * * in such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. * * *"

The Court of Appeals for the District of Columbia has previously determined, contrary to the position now taken by the Board, that the Board should deal with the merits of issues such as those raised by ALPA, even though they relate to events which occurred antecedent to the "actual election procedures." (*Order of Railway Conductors* v. *National Mediation Board*, 141 F. 2d 366, 367 (D. C. Cir. 1944)).

The Board's refusal to take cognizance of such issues under present circumstances is not only inconsistent with applicable law in the District of Columbia Circuit. It is also inconsistent with the Board's own previous statements and conduct concerning its function in this area.

In *WES Chapter, Flight Engineers International Association* v. *National Mediation Board*, 314 F. 2d 234 (D. C.

Cir. November 15, 1962), the Board did in fact take cognizance of a charge similar to that made by ALPA herein, that one of two rival representing organizations was

> "* * * assisted and dominated by the employer in violation of Section, Third and Fourth of the Act: The Board held a hearing on these charges, taking pertinent testimony but declining, because of lack of power, to compel attendance of certain witnesses requested by the Association." (314 F. 2d at 237)

The Court of Appeals there approved the role of the Board in taking cognizance of such issues, and found that the Board had not exceeded its statutory authority by doing so.

In a recent decision by the National Mediation Board in *Matter of Brotherhood of Railway and Steamship Clerks* (Allegheny Airlines, Inc.), National Mediation Board Case No. R-3470 (1962), the Board suspended the processing of a representation ejection in order to deal with evidence of interference and coercion by the carrier, practiced in violation of the rights of employees under Section 2, Third, and Fourth of the Railway Labor Act. To the same effect, see also, *e.g.*, National Mediation Board Case No. R-136 (1935); National Mediation Board Case No. R-385 (1938).

While the Act, judicial decisions and the Board's own past practice demonstrate that, contrary to the position it now espouses, it does possess jurisdiction to deal with these issues, considerations relating to the kind of relief which the Board can provide are highly material.

In this action, ALPA has sought an order

> (1) enjoining any further negotiations or bargaining between American and Allied,
>
> (2) enjoining the making and implementation of collective bargaining agreements by and between them,

(3) enjoining American's continuing refusal to bargain collectively with ALPA as the true representative of the pilots, and

(4) enjoining any changes in the rules, rates of pay, and working conditions applicable to those pilots without ALPA's consent.

ALPA has also sought a declaratory judgment setting forth the respective rights of the parties, as well as damages as compensation for the injuries suffered.

Admittedly, the Board does not issue remedial injunctive orders. Nor can it grant damages for statutory violations. The only remedies which are available at the Board are (1) an order directing an election, or (2) an order refusing to direct an election. If the federal courts have no jurisdiction to deal with such matters, the remedies available for a wide variety of violations are severely restricted. This pronounced inadequacy of remedies available at the Board would, if the Board's jurisdiction over such issues were exclusive, rob the mandates of the Act of most of their force.

To the extent that it may withhold certification from an assisted representing organization, the Board's processes offer, at best, an extremely limited remedy for such conduct —an order refusing to hold an election. But it can issue none of the remedies traditionally utilized to eliminate the continuing effects of interference, assitance and coercion.

Decisions relied on by the Courts below for the proposition that "* * * the 'administrative remedy' before the NMB is 'exclusive'," are completely inapposite to an action in which relief from interference, assistance and coercion is sought. In *General Committee v. M-K-T Ry. Co.*, 320 U. S. 323 (1943), there was no issue relating to influence, coercion or assistance affecting the selection by employees of their representatives. Moreover, that was not an action seeking relief from such conduct. Involved in that case was a juris-

dictional dispute between two railroad Brotherhoods, each of which claimed that it alone was entitled to bargain with the carrier concerning the rules, rates of pay, and working conditions covering a particular job classification. This Court found that dispute to be one for the National Mediation Board and, in the course of its opinion, stated:

> "* * * The Engineers and the Firemen are the collective bargaining agents for their respective crafts and are acknowledged as such. Their authority so to act is not challenged. Nor is it apparent how the majority rule provision of § 2, Fourth is involved here. It states that
>
> 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.'
>
> But concededly the Engineers represent a majority of the craft of engineers and the Firemen a majority of the firemen's craft. The principle of majority representation is not challenged." (329 U. S. at 333-34)

Similarly, the other decisions relied on below for the finding that the federal courts lack jurisdiction over the subject-matter of this action, *Flight Engineers Int'l. Assn. v. Eastern Air Lines, Inc.*, 311 F. 2d 745 (2d Cir. 1963), also involved a union's claim to jurisdiction over a particular work assignment, and was not concerned with issues of influence, assistance and coercion affecting the selection of representative. There, plaintiff sought an injunction requiring the carrier to bargain exclusively with it concerning the position of pilot engineers, and restraining that carrier from bargaining with any other organization concerning the rules, rates of pay and working conditions applicable to that category of employees. Squarely presented was the question whether the position of "pilot engineer" was part of the craft or class of flight engineers. The resolution of

that issue, involving the grouping of employees in a particular job category for purposes of representation, is a matter expressly reserved to the Board under Section 2, Ninth of the Act. The Court refused to decide that question, stating that jurisdiction to do so was vested exclusively in the National Mediation Board. In the course of its opinion, the Court cited the *M-K-T* case and the decision in *General Committee v. Southern Pacific Co.*, 320 U. S. 388 (1943) where this Court defined the *M-K-T* type of jurisdictional dispute as one which

> "* * * raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the *Missouri-Kansas-Texas R. Co.* case and in *Switchmen's* case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts." 320 U. S. at 343-44.

Accordingly, neither the *M-K-T* case nor the *Eastern Air Lines* case stands for the proposition that effective relief from influence, coercion and assistance affecting employees in their right to select representatives of their own choosing may not be fashioned by the federal courts. To read these cases as precedent for the decision below is to destroy the carefully constructed framework for enforcement of the mandates of the Railway Labor Act.

During the period immediately prior to the commencement of this action, it is evident that American was making a bargain with a committee not authorized by the employees to bargain. American and the committee hoped to find a party willing to consummate this bargain. ALPA sought of the federal court an order requiring the company, instead,

to deal with it, the incumbent. The Court below found that it had no jurisdiction to issue such an order.

During the period after this action had been commenced, but prior to the initiation of proceedings before the National Mediation Board, ALPA sought an order of the federal courts directing the company to cease dealing with the unauthorized O'Connell Committee. The Court below ruled that it had no jurisdiction for that purpose.

During the pendency of this action, and after Allied had petitioned the National Mediation Board, at a time when, in view of the Court below, a substantial representation dispute requiring the intervention of the Mediation Board plainly existed, ALPA sought an order of the federal court enjoining the company's dealings with a rival until the resolution of this substantial representation dispute. As to this, the federal court also held itself to be without jurisdiction.

During the pendency of this action, and after election proceedings before the National Mediation Board had been stayed by the federal court pending the determination of charges of the Railway Labor Act violations, the company and the rival organization concluded an agreement, notwithstanding the pendency, wholly unresolved, of the rival's own application to the Board for an election. Here again, the federal court responded to ALPA's application by holding that it had no jurisdiction to enjoin the consummation of that agreement.

In none of these situations does the Mediation Board have power to take effective remedial action even if it were of the view that it has jurisdiction to deal with assistance, coercion and influence prior to the actual conduct of the election.

POINT II

By failing to determine that the respondents violated positive mandates of the Railway Labor Act and that an effective remedy should be provided for such violations, the Courts below departed from fundamental principles of law and have set a precedent for the violation of statutory rights of employees with impunity.

When presented with conflicting claims from two rival representing organizations, each claiming to represent the majority of its employees, an employer must remain neutral until the representation question has been finally determined by the appropriate statutory procedures. This rule has been established and adhered to by the National Labor Relations Board in cases raising issues identical to those presented here.

> *Iowa Beef Packers, Inc.* 144 NLRB No. 64 (Sept. 17, 1963);
> *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945);
> *Novak Logging Company*, 119 NLRB 1573 (1958);
> *Scherrer and Davisson Logging Co.*, 119 NLRB 1587 (1958).

While the foregoing principle of the law of labor relations seemed well established and not open to question, the decision below casts doubt upon the applicability of this principle to cases arising under the Railway Labor Act.

The failure of an employer to remain wholly neutral in the face of rival representation claims constitutes unlawful assistance; since the recognition by the employer of one of the two rivals confers unwarranted prestige on the as-

sisted rival, encourages membership in that organization, and discourages membership in the other. Accordingly, such conduct has, up to now, been found to be interference, coercion and restraint of employees in the exercise of their right to select representatives of their own choosing.

Virginian Ry. Co. v. *System Federation No. 40*, 300 U. S. 515 (1937);
NLRB v. *Pennsylvania Greyhound Lines*, 303 U. S. 261 (1938);
IAM v. *NLRB*, 311 U. S. 72 (1940);
NLRB v. *Link Belt Co.*, 311 U. S. 584 (1951);
NLRB v. *Somerset Shoe Co.*, 111 F. 2d 681 (1st Cir. 1940);
NLRB v. *Clark Bros. Co. Inc.*, 163 F. 2d 373 (2d Cir. 1946);
NLRB v. *Marcus Trucking Co.*, 286 F. 2d 583 (2d Cir. 1961);
NLRB v. *John Englehorn & Sons*, 134 F. 2d 553 (3d Cir. 1942);
NLRB v. *Stowe Spinning Co.*, 165 F. 2d 609 (4th Cir. 1946);
NLRB v. *Stewart*, 207 F. 2d 8 (5th Cir. 1953);
Ferro-Alloys Corp. v. *NLRB*, 213 F. 2d 646 (6th Cir. 1954);
NLRB v. *Kearney & Trecker Corp.*, 237 F. 2d 421 (7th Cir. 1956);
Elastic Stop-Nut Corp. v. *NLRB*, 142 F. 2d 371 (8th Cir. 1944);
NLRB v. *Knickerbocker Plastic*, 218 F. 2d 917 (9th Cir. 1955);
Local 483 v. *NLRB*, 288 F. 2d 168 (D. C. Cir. 1961);
Iowa Beef Packers Inc., *supra*;
Matter of Pan American Airways Inc., 1 Determinations of Craft or Class 381, 386.

No distinction can properly be drawn between the duty to remain neutral under the National Labor Relations Act and the corresponding duty under the Railway Labor Act. Section 7 of the former, providing in part that:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing * * *"

is the equivalent of Section 2, Fourth, of the Railway Labor Act, which provides in relevant part:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing."

Recognizing the identity of purpose and, substantially, of language which is shared by the two statutes, this Court, in *NLRB* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261 (1938), stated:

> "Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was 'an amplification and further clarification of the principles' of the latter. Report of the House Committee on Labor H. R. 1147, 74th Cong., 1st Sess. p. 3. It had before it the Railway Clerks case [Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548] which had emphasized the importance of union recognition in securing collective bargaining. Report of the Senate Committee on Education and Labor, S. Rep. 573, 74th Cong., 1st Sess., p. 17, and there were then available data showing that once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other. The National Labor Relations Act continued and amplified the policy of the Railway Labor Act by its declaration in Section 7, and by providing generally in Section 8 that

> any interference in the exercise of the rights guaranteed by Section 7 and specifically the domination or interference with the formation or administration of any labor organization were unfair labor practices." (303 U. S. at 266-67)

In January, 1963, when American began its negotiations with the O'Connell Committee over ALPA's protest, American was engaging in a refusal to bargain with the incumbent representative at a time when no real doubt as to ALPA's representative status was possible. Even if the O'Connell Committee was then a rival organization within the meaning of the *Midwest Piping* doctrine,* O'Connell himself testified that as of January 1, 1963, neither he, his committee, nor the pilots themselves were claiming that ALPA's representative status had been terminated.** If any genuine doubt as to ALPA's representative status was in fact present, then a real question of representation, sufficient to require American to remain neutral and to refrain from dealing with any group, was raised. If no such question was then presented, American should have dealt only with ALPA.

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* See *Cabot Carbon Company* v. *NLRB*, 250 F. 2d 281, 289 (5th Cir. 1958), and see cases cited therein at page 289, Note 9.

** Both the MEC and the O'Connell Committee owed their existence to the ALPA Constitution and Bylaws, which, *a fortiori*, set forth the conditions under which such existence might continue when the status conferred by the ALPA Constitution and Bylaws was terminated by operation of that Constitution and Bylaws. American could not properly be heard to say that such termination was ineffectual. Certainly the Court below should not have concluded that ALPA remained an unwilling principal, bound by the acts of a runaway, faithless and disenfranchised agent after all the world had been told that the agent's authority was terminated. But even in January and February, 1963, in the course of separate negotiations between American and the O'Connell Committee, American's negotiators' notes still refer to the O'Connell Committee as "ALPA"

[Continued on page 50]

The Court below, in its opinion, recognized that as of January and February, 1963, there was no representation dispute. The District Court also recognized that fact.* This should have led to a finding that American's refusal

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[Continued from page 49]

(See, *e.g.*, P. App. 148a, 148d, 148ll). Yet, those same Company negotiators' notes show that ALPA's wire to American, advising that carrier that the O'Connell Committee was wholly without authority to negotiate, was read aloud at the negotiations on January 21, 1963, and that, on January 3, 1963, Ruby, ALPA's President

> "* * * asked Company to open 'bona fide' negotiations end of Feb. WBW (Whitacre, American's Vice President) said no. Ruby intimated that O'Connell's Committee does not represent the majority of AAL pilots." (P. App. 148j).

Nor did the Court below properly conclude that ALPA was bound to supply a substitute committee as proof that it did not endorse O'Connell's actions, and that, by failing to supply such a substitute, ALPA is somehow bound by the conduct of O'Connell's Committee. The Court found that prior to January, 1963, O'Connell's Committee was clearly subordinate to ALPA, but that after that date, such subordination disappeared. It said:

> "Rather than refusing to deal with the union's bargaining representative and negotiating with the employees directly, as the employer did in *Medo*, American dealt for months with the very group with which ALPA's Constitution and Bylaws and Policy told it to deal; and when an impasse developed through ALPA's refusal to accept the results of the negotiation, * * * ALPA was unable to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual."

* The District Court stated:

> "These motions ask in substance that a preliminary injunction issue directing the Company to bargain with ALPA as the 'true representative' (360 U. S., at 548) of its pilot employees and restraining any bargaining as to pilots with any other group.
>
> "*Whatever may have been the situation when the motions were made*, since April 24, 1963, a proceeding has been pending before NMB to determine whether ALPA or Allied is the true representative of the pilots * * *." (App. 74a; emphasis supplied).

to bargain with ALPA in those months was unlawful. Instead, it reached a wholly different conclusion, stating:

> "* * * even though we accept appellant's argument that, in the light of § 2 Second, Fourth and Sixth, it is not fatal that ALPA never had been certified so as to come within the precise command of § 2 Ninth that the employer 'treat with the representative so certified,' the courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute requiring the intervention of the Mediation Board under § 2 Ninth—a development which became an almost inevitable prospect within a few weeks after this action was brought on March 1 and crystallized into a certainty by late April." (Appendix 14a)

The *Midwest Piping* doctrine prohibits the recognition of one of two rivals whenever a genuine question of representation is presented. But the Court below, acknowledging the presence of a representation dispute commencing no earlier than March (and not yet resolved), nevertheless gave its blessing to the execution and implementation of an agreement by Allied and American in July, at a time when the courts had enjoined the Mediation Board from holding a representation election, and following negotiations, over ALPA's protest, between American, the O'Connell Committee and then Allied.

While a uniform definition of "question of representation" is difficult of formulation, and a definition of that term depends upon the facts of each case (*NLRB* v. *North Electric Co.*, 296 F. 2d 137 (6th Cir. 1961)), it seems difficult to deny that a question of representation, produced by American's interference and assistance in support of Allied's creators, was present on and after March 21, 1963, the date Allied was created. Allied itself indicated the

presence of such a question on April 24, 1963, in its application to the Mediation Board for an election, naming itself and ALPA as parties to a representation dispute. (A copy of that application is set forth at Appendix 103a-104a.) ALPA, as the incumbent representative of the affected employees since 1939 had a substantial interest in the representation of such employees, sufficient to raise a real question of representation throughout the period of time material to this action (*Air Master Corp.*, 142 NLRB No. 23 (April 23, 1963)). In *NLRB* v. *Kearney & Trecker Corp.*, 237 F. 2d 421 (7th Cir. 1956), a question of representation had been found to be present solely as a result of "two rival unions fighting bitterly for the position of exclusive bargaining representative. * * *" In *Novak Logging Co.*, 119 NLRB 1573 (1958), under circumstances similar to those present here, the Board found

> "* * * a real question concerning representation existed as a matter of law when on August 7, 1956, LSW made its representation claim upon the respondent, was recognized and accorded a contract as exclusive bargaining agent of respondent's employees." (119 NLRB at 1574)

There, the employer had disregarded the incumbent's claim to representative status and had instead recognized and negotiated with a rival seeking to attain that status. The Board found a representation question to be plainly presented.

Similarly, in *Scherrer and Davisson Logging Co.*, 119 NLRB 1587 (1958), the Board held that when an employer is

> "* * * confronted with conflicting claims from two rival labor organizations, each claiming to represent a majority of its employees * * * a real, genuine and valid question concerning representation exists." (119 NLRB at 1588)

ALPA's status as incumbent representative, unchallenged during the preceding 24 years, its status as a labor organization with whom negotiations had commenced in 1961 and continued until December, 1962, and its continuing claim to representative status in January, 1963, and thereafter, makes necessary a finding either (1) that no genuine doubt as to ALPA's status could be raised, or (2) that a genuine question of representation was presented. In either case, American's negotiations over ALPA's protests with O'Connell's Committee, which later became the Allied Pilots Association, were unlawful.

The employer's breach of the obligation of strict neutrality in the face of rival representation claims is not excused by proof of good faith or of honest intention."

Garment Workers v. *NLRB*, 366 U. S. 731 (1961).

Even if good faith were a defense to unlawful assistance, interference and coercion, good faith was not, as a matter of law, present here. American recognized and commenced negotiations with the O'Connell Committee without requiring *any* evidence that that Committee was supported by a majority of the pilots. Indeed, there is no indication that American even requested a showing of authorization cards by O'Connell in January, 1963. It is clear that no signed authorization cards in favor of O'Connell's Committee were in existence, much less tendered to American at that time.

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* The District Court reached an opposite conclusion. It held:

"The fact that the Company continued to deal with the Negotiating Committee was not in my view any violation of the Act, considering that the Company acted in good faith, reasonably, without any practical alternative, and without any anti-union motivation." (Appendix 785)

No authority for these conclusions was furnished by the Court. ALPA has found no decision in which the subjective considerations referred to by the District Court were found to be a defense to objective assistance and coercion.

The only justification offered for the commencement of separate negotiations between American and the O'Connell Committee in January, 1963, is the "resolution" of the American Airlines Pilot Master Executive Council of January 8-11, 1963. As a vice president of American testified below, O'Connell, in January,

> "* * * reiterated this postition that he represented the majority of the pilots in the employ of the company. He presented us with some of the MEC resolutions endorsing the resolutions of the committee."

The resolution referred to was adopted by the MEC at their meeting of January 8-11, 1963, in which they stated in part that:

> "* * * The AAL-MEC, speaking for the entire AAL pilot group, goes on record as authorizing the AAL Negotiating Committee to conclude a contract and further to advise AAL management that the AAL pilots are agreeable to implementation of said contract with or without formal approval of the ALPA * * *." (Appendix 102a-103a).

Since even a showing of representation cards in January, 1963, would not have authorized American to enter into separate negotiations with the O'Connell Committee, the boot strap resolution of the MEC, standing alone, and conceived and adopted by the same few individuals who then favored such separate negotiations with American, certainly does not provide such authority. As the Board stated in *Novak Logging Company*, 119 NLRB 1573 (1958), the

> "* * * Respondent could not assume to judge for itself upon a showing of authorization cards which of the contending unions was the statutory representative of the employees." (119 NLRB at 1575)

American, in January, 1963, made no attempt to ascertain the degree of pilot support for the O'Connell Committee. The Company has admitted that O'Connell tendered nothing but the resolution of his MEC in support of his January request for separate negotiations (P. App. 90). Its sole concern was the immediate resumption of negotiations with a committee known to be willing to make a bargain favored by American. It had no indication or evidence then, or indeed until over six months later, that *any* of its pilots were in sympathy with O'Connell's Committee. By rushing headlong into such negotiations over ALPA's protest, American acted wholly without the good faith which this Court has required of an employer faced with the claim of only a single union in a far less sensitive situation.*

In *Garment Workers* v. *NLRB*, 366 U. S. 731 (1961), this Court set aside an agreement negotiated by an employer with a labor organization after it found that the employer had not taken reasonable steps to verify the union's claim of majority support. In that case, there was no rival to the union which received the unlawful recognition, since only one union was aspiring to representative status. Under such circumstances, recognition by the employer of that union would have been proper had the union produced authorization cards of a majority of the employees prior to recognition and bargaining. Instead, however, both

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* In fact, American very self-consciously moved the District Court in March for the appointment of a Special Master in a belated attempt to ascertain the fact which it hoped to use as support for its conduct in January and February—whether its pilots supported the O'Connell Committee and the separate negotiations. This motion was never decided, since the District Court found that

> "* * * the passage of time and the disposition of the other motions have eliminated any necessity of such relief to the Company." (Appendix 82a)

the employer and the union assumed, without checking, that the union represented a majority of the employees in the unit. This Court disapproved of such an assumption, stating:

> "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard—Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards." (366 U. S. at 739-40)

Even if authorization cards had been supplied and carefully checked against American's payroll records, and even if it is also assumed that they had some materiality in a situation in which rival unions claimed representative status, such cards are generally held to be little indication of the wishes of employees, and that, under such circumstances, a secret ballot election is the only reliable means of ascertaining the true representative.

> *NLRB* v. *Swift & Co.*, 294 F. 2d 285 (3d Cir. 1961);
> *Novak Logging Company*, 119 NLRB 1573 (1958);
> *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945).

In this case, no authorization cards were secured until April, 1963, when Allied applied to the National Mediation Board for a representation election, over four months after American's refusal to bargain with ALPA. Such cards were produced after the March 15 agreement had been circulated among the pilots, and after it was made known to them that the selection of Allied as their repre-

sentative was the condition precedent to the implementation of that agreement.

Thus, authorization cards came only after most of the conduct complained of had occurred. This should not mistakenly be used to obscure the fact that the effects of the January violations continued during the period of the solicitation of cards and thereafter. The cards were the product of solicitation by mail and such other methods as Allied may have employed. This Court may take judicial notice of the fact that any employee whose name appears on a published seniority list and who fails to execute or return an authorization card during such a solicitation may, in greater or lesser degree, feel intimidated. This Court may likewise take judicial notice of the fact that the simplest way for many is to sign when a signature is solicited from an open list, even if this involves authorization, revocation, or authorization for more than one organization. Indeed, the National Mediation Board, dealing with similar situations arising under the Railway Labor Act, has stated:

> "In the investigation of representation disputes, it is not uncommon to encounter situations where incumbent organizations circularize employees and secure signatures on forms which state that the employee revokes his authorization in support of the applicant organization.
>
> * * *
>
> "The presence of authorizations and counter authorizations is no reliable indication of the true desires of employees for representation. It is only when the employee is given an opportunity to vote by secret ballot that his true desires are expressed and often the results of such elections are quite different than indicated by the preelection buildup." *Sixteenth Annual Report*, at pp. 19-20.

Authorization cards are, therefore, unreliable indications of the wishes of employees in a representation dispute

involving rival unions. They are legally insufficient to justify an employer's departure from his duty of strict neutrality under such circumstances. And they are wholly irrelevant when produced at some later time, purporting to be retroactive justification for antecedent recognition.

Garment Workers v. *NLRB*, 366 U. S. 731 (1961).

In the *Garment Workers* decision, this Court rejected the union's showing of majority support as of the date that it signed the contract with the employer, since there had been no showing of majority support for the union as of the date when it first received the employer's recognition. This Court found that the affected employees had been deprived, as a result of such premature recognition, of their right to select representatives of their own choosing, and it said:

> "* * * It is, therefore, of no consequence that Petitioner may have acquired by October 10 the necessary majority if, during the interim, it was acting unlawfully. Indeed, such acquisition of majority status itself might indicate that the recognition secured by the August 30 agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support." (366 U. S. at 736)

In contrast, the Court below, in a situation even more deserving of a remedy than that presented in the *Garment Workers* case, reached an opposite conclusion, finding that the authorization cards tendered to American by Allied on July 9 were indeed material and relevant. It stated:

> "American recognized [i.e. executed the agreement previously negotiated] Allied only when possessed of substantial evidence that Allied represented an overwhelming proportion of its pilots and when threatened with a strike if it refused recognition." Appendix 13a)

It is not necessary, for a finding of unlawful assistance by an employer faced with rival union claims, to show that the employer initiated the organization of a company union.

International Association of Machinists v. *NLRB*, 311 U. S. 72 (1940).

But there is evidence that, between January and March, American did plant the seed for formation of a rival representing organization, and that the fruit of that seed was the Allied Pilots Association, an organization created by the O'Connell Committee over two months after American commenced separate negotiations with it in January, 1963. At least "eight or ten times," American's vice president advised the employees that if ALPA did not accept the contract then being negotiated by American and the O'Connell Committee,

> "* * * the company couldn't do business with any group unless they were represented by a formal and responsible organization."

American's motive is exposed by the conduct of its Vice President Whitacre, who, while attending a meeting of American's employees in Los Angeles in February, 1963, made a lengthy statement, a substantial portion of which was admitted by him before the District Court. Whitacre told these employees that

> "* * * he personally thinks ALPA will take the deal; if they don't, 'Nick' has a problem; if 75% of the pilots ratify it, the Company will implement it; they must have an organization to do business with; it must include pilots and flight engineers in one unit; if this group of pilots formed a separate organization and the flight engineers joined them, and they rented an office near the Company's office, with some clerical help there, and hired a reputable attorney, they'd be better off; ALPA would probably

> ask them to return in a couple of years; he is not holding anybody to it; he doesn't care if we throw the initialed document away; we're negotiating the green book, not the red book; all of this is not American's proposal; 'Nick' said if they agreed to it, he'd 'deliver' the engineers; so far as he's concerned, he has a deal with the pilots' agreement; he intends to retire but, before he does, he wanted to do something about that outfit in Chicago [ALPA]." (P. App. 142)

The District Court dismissed Whitacre's statements as "insignificant" (Appendix 78a), holding that they were addressed to flight engineers, not pilots, and were therefore immaterial to Petitioner's claim. But the District Court found that American unlawfully refused to bargain with the AA Chapter, FEIA, stating that

> "From at least as early as January 31, 1963 to July 11, 1963, the Company refused to bargain collectively with the Chapter and until at least as late as March 15, 1963, the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers." (Appendix 79a)

The effects of interference with employee representation rights cannot properly be confined to a narrow category of employees. American's pilots were, as a matter of law, exposed to the pressures of such unlawful conduct, and a remedy should have been provided. See *United States Rubber Co.*, 86 NLRB 3 (1949).

A curious sequence of events occurred here. Collective bargaining preceded the identification and selection, *by the bargainers*, of the employees' representative. But the Railway Labor Act contemplates the selection of a representative first, followed by collective bargaining between that representative and the employer. Joseph B. Eastman, Federal Coordinator of Transportation, testified at hear-

ings before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934), at page 57, as follows:

> "Eastman: * * * collective bargaining requires some form of organization. That is what the word 'collective' means, it seems to me. I do not see how a group of individuals could do a thing collectively without some manner of organization.
>
> Mr. Huddleston: Does that imply then that they should be members of an organization?
>
> Eastman: Well, I would think that they would have to have an organization of some sort before they could act collectively."

In the District Court, O'Connell made a most significant statement in the course of his testimony:

> "The Company has committed themselves to the fact that they have an agreed-to amended basic working agreement with related documents that they will honor and put into effect at such time as there can be produced a person with the satisfactory credentials to sign the documents."

Such a procedure unlawfully reverses the established collective bargaining process. Its apparent objective is to produce an agreement which may be used, as it was used here by American and O'Connell, to evoke the support of the affected employees for the assisted representing group.

The transformation of the O'Connell Committee into the Allied Pilots Association on March 21, 1963, did not toll the continuing violations of the Act. Allied, far from a stranger to the participants in the unlawful negotiations, is, of course, their creature. The taint of assistance and coercion carriers over into successor organizations where there is no absolute cleavage or clear delineation between the assisted group and its successor:

> "* * * where a labor organization appears to be the successor to an earlier company dominated union,

> the Board and the courts have consistently held that the later organization inherits the illegality of the earlier one and that the effect of company domination and support continues unless the employer, before the formation of the new organization, has unequivocally and publicly disavowed and disestablished the earlier illegal union and has assured the employees of their freedom from further employer interference * * *."
>
> *Sixteenth Annual Report of the National Labor Relations Board*, 155-59 (1951).

American obviously regards the contract negotiated with the O'Connell Committee as the instrument by which pilot support was produced for the Allied Pilots Association. The use for which the March 15 agreement was intended was neatly encapsulated by American's Vice President, who testified that he advised ALPA's representatives on January 30, 1963, that, in view of the improvements in working conditions which would be provided in that agreement, the O'Connell Committee would receive almost unanimous support from the pilot group, though O'Connell and his Committee had theretofore received little support from the pilots. (See pages 23-24, *supra*.) But an employer should not be permitted to enjoy the fruits of his unlawful conduct with impunity. This Court has recognized that:

> "* * * once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other."
>
> *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267 (1938).

To the same effect, see *Garment Workers* v. *NLRB*, *supra*.

In this action, American has sought to justify its conduct by arguing that as a result of the authorization cards produced by Allied, ALPA has been shown to have lost its former status as representative of the majority of the pilots. But whatever loss of support has been suffered by ALPA * is a direct result of American's interference, assistance and coercion. *National Licorice Co.* v. *NLRB*, 309 U. S. 350 (1940).

Even if each of the affected employees were now shown to be in support of Allied, the arrangements between American and Allied would nevertheless be unlawful, since such support would be a direct result of the agreement unlawfully negotiated between American and Allied's predecessor. Such support would not affect the need for an effective remedy to eliminate the continuing effects of the interference, coercion and assistance. *Garment Workers* v. *NLRB*, *supra*. The Second Circuit recognized in a recent decision that:

> "At the first sight it seems, indeed, a far cry from the objectives of the Act that we should hold it an unfair labor practice for an employer to join an uncoerced majority of its employees in an action they both want, when the only injured persons are the minority and an organization whose position depends on a suffrage it no longer possesses."

"But," the Court continued,

> "* * * the underlying purpose of this statute is industrial peace and * * * to allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it."

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* The extent of pilot support for either ALPA or Allied during the period covered by this dispute has never, to date, been ascertained by any objective or acceptable measurement.

NLRB v. *Marcus Trucking Co.*, 286 F. 2d 583, 593 (2d Cir. 1961).

The principles applied in the *Marcus* case should also have been applied in this case, where the employer acted without good faith, and where the majority support claimed by Allied is, if it exists, the support of a coerced majority, comprised of employees acting under the influence of their employer's plain indication of a preference as between rival unions. The objective of interference, coercion and restraint by an employer is to produce a collective state of mind in a group of employees which causes them to favor one of two rival labor organizations. Thus, it is wholly circular to argue that no interference was practiced because the employees now indicate their support for the assisted union.

The coerced state of mind is conclusively presumed from the fact of assistance, without more. Where an employer confers premature and unlawful recognition upon one of two rival labor organizations, majority support for the organization which received the benefit of such assistance is presumed to be the support of a coerced majority. *Scherrer & Davisson Logging Co.*, 119 NLRB 1587 (1958). There, the Board stated:

> "By executing of a contract with the LSW in the face of the conflicting claim of the LWA which raised a question concerning representation, the Respondent breached its neutrality, accorded the LSW unwarranted prestige, encouraged membership therein, discouraged membership in IWA and thereby rendered unlawful assistance to the LSW. The respondent has thus interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act." (119 NLRB at 1588-89)

Proof of the effects of the employer's assistance and coercion are not necessarily dependent upon outward manifestations of restraint by the employer, even though such manifestations are apparent here. (*NLRB* v. *Marcus Trucking Co.*, 286 F. 2d 583 (2d Cir., 1961)). The existence of such unlawful effects are presumed from reasonable factual indications. This Court, in *NLRB* v. *Link Belt Co.*, 311 U. S. 584 (1941), stated:

> "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." (311 U. S. at 588)

And this Court has found that

> "We are dealing here * * * with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination or influence. The existence of * * * interference must be determined by careful scrutiny of all the factors, often subtle, which restrained the employee's choice and for which the employer may fairly be said to be responsible."
>
> *International Association of Machinists* v. *NLRB*, 311 U. S. 72, 80 (1940).

The remedy for unlawful assistance, interference and coercion must effectively and completely dissipate the unlawful conduct. In *International Association of Machinists* v. *NLRB*, 311 U. S. 72 (1940), this Court stated:

> "* * * It cannot be assumed that an unremedied refusal of an employer to bargain collectively with

> an appropriate labor organization has no effect on the development of collective bargaining. See *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates." (311 U. S. 72, 82)

Indeed, an order directing the employer to bargain with the incumbent has been held to be the *only* effective remedy for an earlier unjustified refusal to deal with the incumbent. In *Franks Bros.* v. *NLRB*, 321 U. S. 702 (1944), this Court found appropriate a remedy

> "* * * which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement." (321 U. S. at 704-05)

It approved the Board's determination that

> "* * * *the only means* by which a refusal to bargain can be remedied is an affirmative order requiring the employer to bargain with the Union which represented a majority at the time the unfair labor practice was committed." (emphasis supplied) (321 U. S. at 703-04)

Though the decision of the Court below is based upon its view that the federal courts lack jurisdiction over the complaint here, the Court nevertheless indicated that if it did possess jurisdiction, it would not favor ALPA's position on the merits. In its discussion of the merits, the Court made no reference to generally accepted authority in this area, and it referred only to decisions which are neither representative of the majority view nor applicable to the circumstances of this case.

Indeed, the decision upon which the Court below appears to have placed its chief reliance, *NLRB* v. *Indianapolis Newspaper Inc.*, 210 F. 2d 301 (7th Cir. 1954), is viewed with disapproval by the National Labor Relations Board (see *Novak Logging Co.*, 119 NLRB 1578 (1958); *Scherrer & Davisson Logging Co.*, 119 NLRB 1587 (1958)). The *Indianapolis* case has been shown, by a recent decision of the Seventh Circuit, the same Court which decided it, to be inapplicable here. See *St. Louis Independent Packing Co.* v. *NLRB*, 291 F. 2d 703 (7th Cir. 1961).

In the *Indianapolis* case, the employer recognized a newly formed independent union and refused to continue negotiations commenced with the incumbent after the independent produced a petition, signed by more than 60% of the employees requesting such negotiations, and after such signatures had been checked against payroll records and found to be authentic. The employer and the independ-

ent union thereafter concluded an agreement which, after ratification by the employees, was executed and placed in effect.

The incumbent union filed an unfair labor practice charge with the National Labor Relations Board, alleging assistance and interference by the employer, and the Board found merit to the charge. It ordered the employer to refrain from recognizing the independent and from giving effect to the agreement with it. The Seventh Circuit refused to enforce the Board's order, however, stating that:

> "* * * The Act forbids interference by an employer with the rights of his employees to bargain collectively, and, for that purpose, to select their own bargaining representative. When two unions are vieing for majority support of his employees, an employer must, of course, maintain a position of strict neutrality. He must refrain from any action which tends to give either an advantage over its rival; he may do nothing which tends to coerce his employees to join or to refrain from joining a particular union. Recognition of one competitor as bargaining agent during this contest period, absent proof of majority support, is a proscribed act. (Citations omitted.)
>
> "The Act does not require, however, that this neutrality continue until the last dissident voice is stilled. Indeed, in keeping with the purpose of the Act, harmonious employer-employee relations require that the instability inherent in a contest end when one contestant is able to muster majority support. Although the prize of recognition must not be employed coercively to influence the employees in making their decision, once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees. (Citations omitted.)

> "* * * The decisive question in any case is whether there has been an uninfluenced expression of majority will; it matters not how that will be expressed. Although the result of a secret election may well be the most convincing means of expression, the election medium is by no means exclusive." (210 F. 2d at 503-04)

That decision has recently been explained by the Seventh Circuit. In *St. Louis Independent Packing Co.* v. *NLRB*, 291 F. 2d 700 (7th Cir. 1961), that Court stated:

> "We have had occasion to point out that where a real question of representation exists an employer's duty to observe strict neutrality in matters relating to the employees' choice of bargaining representative precludes his bargaining with one of the rival labor organizations. Thus, in N. L. R. B. v. Indianapolis Newspapers, Inc., 210 F. 2d 501, 503, * * * we found no unfair labor practice because of absence of a real question of representation at the time the employer recognized one of the rivals * * *." (291 F. 2d at 704)

If the *Indianapolis* principle is not applicable where "* * * a real question of representation * * *" is raised, then it should not have been applied to this case by the Court below. For we have the agreement of that Court and of the Allied Pilots Association that a "substantial representation dispute requiring the intervention of the Mediation Board" was presented by Allied's claim, even if we pass for a moment American's unlawful conduct between January and March, before Allied came into existence. Moreover, there is a material distinction between *Indianapolis*, where the employer did not enter into negotiations with the independent until it was presented with the signatures of employees, found to be authentic after careful checking, and the instant case, where authorization

cards came only after most of the conduct complained of had occurred.

The *Indianapolis* case was limited to a situation in which no real question of representation is presented by the other decision chiefly relied upon by the Court below, *District 50, United Mine Workers* v. *NLRB*, 234 F. 2d 565 (4th Cir. 1956). There, evidence presented before negotiations were commenced supported a conclusion that one of the two rival unions involved was almost wholly without support among the employees. The employer, before conferring recognition upon one of the rivals, caused a card-check to be made by a disinterested arbitrator who found that one of the rivals was clearly supported by a majority. The Board held that recognition under such circumstances constituted an unfair labor practice, under its *Midwest Piping* doctrine. The Fourth Circuit refused to enforce the Board's order, however, finding the absence of a real question of representation at the time of such recognition.

The only decision of this Court cited on this question in the opinion below is *United Mine Workers* v. *NLRB* 351 U.S. 62, 72 note 8 (1956). It was apparently cited only for the contents of footnote 8, which states that "a Board election is not the only method by which an employer may satisfy himself as to the union's majority status." This principle is, of course, not disputed in factual situations to which it is applicable, but it is obviously inapplicable here.

The only other authority cited by the Court below for the proposition that the issues raised by ALPA are without substantial merit is the Second Circuit's own previous decision in *NLRB* v. *Superior Fireproof Door & Sash Co.*,

289 F. 2d 713 (2d Cir. 1961). That decision was referred to by the Court for the proposition that

> "* * * a condition to any right of the employer to refuse, after the certification year, to bargain with a union which he reasonably thinks to be the majority, or to act unilaterally, is that the 'loss of majority was not attributable to unfair labor practices of the employer' * * *." (289 F. 2d at 719)

To the extent that the *Superior* decision conflicts with the principle that the presence of a real question of representation makes it unlawful for an employer to deal with either of two rivals, that decision is unsound. But if the *Superior* principle is applied to the facts of this case as they existed in January, at the time of American's earliest refusal to bargain with ALPA, the time of commencement of separate negotiations with the O'Connell Committee, all of which occurred more than six months before authorization cards were presented to American, that decision provides no justification whatsoever for the employer's conduct.

The Court below made no reference to the *Midwest Piping* doctrine, to the decision of this Court in *Garment Workers* v. *NLRB*, 366 U. S. 731 (1961), or to the many decisions cited by Petitioner herein and below in support of the proposition that an employer confronted by substantial claims of rival unions must remain strictly neutral until the conflict has been resolved in the manner provided by law. Nor did the Court make reference to the authorities holding that a rival representing group such as Allied which accepts recognition from an employer under such circumstances is equally guilty, with the employer, of interference and coercion. See, *e.g.*, *Garment Workers* v. *NLRB*, *supra*; see also *Air Master Corp.*, 142 NLRB No. 23 (April 23, 1963).

CONCLUSION

A writ of certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals, No. 28417 (September 16, 1963)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 419—October Term, 1962

(Argued September 5, 1963 Decided September 16, 1963)

Docket No. 28417

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Appellants,

v.

AMERICAN AIRLINES, INC.,

Appellee,

and

NICHOLAS J. O'CONNELL, JR., individually, and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Appellees.

Before:

CLARK, WATERMAN and FRIENDLY, *Circuit Judges.*

Appeal by plaintiffs from a judgment of the District Court for the Southern District of New York, Inzer B. Wyatt, Judge, dismissing their complaint in an airline labor dispute for lack of jurisdiction over the subject matter. Affirmed.

Opinion of the United States Court of Appeals for the Second Circuit, No. 28417 (September 16, 1963)

HENRY WEISS (Cohen and Weiss), New York, N. Y., (Herbert A. Levy, of Counsel), *for Appellants.*

ARTHUR M. WISEHART, New York, N. Y. (George A. Spater, of Counsel), *for Appellee American Airlines.*

MARTIN C. SEHAM, New York, N. Y., *for Additional Appellees.*

CARL EARDLEY, MORTON HOLLANDER and HOWARD E. SHAPIRO, Attorneys, Dept. of Justice, Washington, D. C., *filed Brief Amicus Curiae on behalf of the National Mediation Board.*

FRIENDLY, Circuit Judge:

This appeal again raises the problem as to the role of the courts with respects to labor disputes in an industry governed by the Railway Labor Act, 45 U. S. C. §§ 151-188. The Air Line Pilots Association (ALPA), a nationwide union of airline pilots, endeavored in this action to protect its historic status as bargaining representative of American Airlines' pilots, primarily by seeking injunctions that would prevent the defendants—American and a negotiating committee of American pilots which later became the nucleus of a new union—from dealing with one another, and would require American to negotiate with ALPA instead. We affirm the conclusion of the District Court that ALPA made no case warranting judicial intervention in this area, which Congress has so largely committed to the National Mediation Board.

In view of Judge Wyatt's comprehensive statement of the facts we shall limit ourselves to those we deem most

important.[1] American Airlines' last pilot contract before the instant dispute was made with the air line pilots in its service "as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL", which, as the contract recited, "has shown satisfactory proof to the Company of the fact that it represents more than a majority of the air line pilots of the Company." The contract was to be effective until July 21, 1960, and was to renew itself annually thereafter unless written notice of intended change was served, pursuant to § 6 of the Railway Labor Act, 45 U. S. C., § 156, at least 60 days prior to July 21 in any year. In March, 1961, American sent such a notice to the president of ALPA, and ALPA sent such a notice to American.

To appreciate the relationship of the parties and the source of the controversy, some understanding of ALPA's structure is required. The basic unit is a Local Council composed of the member pilots of a single airline at an operating base. Certain officers of the Local Councils constitute the airline's Master Executive Council (MEC); this body is "empowered to make the final decision on any problem or problems of the members of that air line, except as provided elsewhere in the Constitution and By-Laws." The Chairman of the MEC is "An ex officio member of the Negotiating Committee." The Negotiating Committee is not otherwise described in the Constitution and By-Laws, but the ALPA Policy Manual says that it shall be selected by the MEC on each airline, and that it "shall have the authority to conclude an agreement subject to the provisions of Article XVIII of the Constitution and By-Laws" which provides that conferences or negotiations to make employment agreements shall not be initiated, carried on,

1 Judge Wyatt's opinion also dealt with a related dispute between American and the Flight Engineers' International Association. This is not before us, and we intimate no views in its regard.

or concluded in the name of ALPA without the prior approval of the Executive Committee or the President, and that no such agreement shall become effective unless signed by the President or some other officer authorized by one of ALPA's central governing bodies.[2] The latter are a Board of Directors containing representatives of all the Local Councils, an Executive Board containing the chairmen and vice-chairmen of all the Master Executive Councils, and an Executive Committee. Thus, while the established procedure is for an agreement with an airline to be negotiated by a committee of its own pilots, the negotiation takes place under the eye of ALPA's central organization and the agreement is not concluded without the approval of the upper echelon of ALPA's policy makers.

The negotiations that began in 1961 between American and a pilots' negotiating committee, formed in accordance with ALPA policy,[2] were complicated from the outset by the controversy as to cockpit crew complement on jet aircraft which has occasioned a number of disputes and strikes and has been the subject of two decisions of this court. *Pan American World Airways* v. *Flight Engineers Int'l Ass'n*, 306 F. 2d 840 (2 Cir. 1962); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines*, 311 F. 2d 745 (2 Cir. 1963). On October 21, 1961, American notified the ALPA negotiating committee that it accepted the recommendations of a commission, appointed by President Kennedy and chaired by Professor Nathan Feinsinger, that the cockpit crew on jet aircraft should consist of three persons (as desired by the airlines) rather than four; that a flight

2 It was customary for an employee of ALPA to attend such meetings as "staff negotiator". Later, in November, 1962, ALPA withdrew its representative from the discussions between American and its pilots.

engineer serving as one of the three should be possessed of a Commercial Pilot's Certificate and Instrument Rating ("C and I") (as desired by ALPA); and that ALPA and the Flight Engineers' International Association should merge, with the job equities of the pilots and engineers reasonably protected. On November 7, 1961, the President of ALPA wrote the National Mediation Board (NMB) that the crew complement problems were "but minor issues on American Airlines" as compared with pilot proposals on retirement and working conditions, notably a reduction of hours. American took the position that it could not grant these if it also had to undergo the expense of training its flight engineers up to the C and I requirement. After mediation by the NMB proved unsuccessful and ALPA declined a suggestion of arbitration which American had accepted, the NMB, on July 18, 1962, notified the parties that its services had terminated. This left American's pilots free to strike after the lapse of 30 days, 45 U. S. C. § 155 First, unless an Emergency Board were appointed as provided in 45 U. S. C. § 160.

Shortly before this, the Secretary of Labor had achieved a break-through on the problem of cockpit crew complement as to TWA, on the basis of the Feinsinger Commission's recommendations. American's engineers approved these terms but the Company informed the Department of Labor that this settled nothing, since the American pilots had preferred a reduction in hours and other benefits to the four man crew and had recently expressed a preference that American spend its money for such benefits rather than in qualifying flight engineers for the full C and I cer-

tificate.[3] During July, 1962, various meetings were held between the Labor Department, Chairman Edwards of the NMB, the company, the negotiating committee (including the ALPA staff representative), and Ruby who had recently become president of the ALPA. In the course of these, O'Connell, Chairman of the American MEC and one of the pilot negotiators, expressed the preferences of the American pilots along the lines just stated. At later meetings, O'Connell proposed that, if American would grant its pilots reduced hours and an improved retirement plan, they would agree to the three man crew without insisting on the C and I, and would bring the flight engineers into ALPA as the Feinsinger Commission had proposed. Since the pilots' willingness to relinquish the C and I requirement conflicted with what had been ALPA policy, American raised the question whether they could secure an ALPA approving signature; the negotiating committee expressed optimism. During November the Company met with the pilots and the flight engineers jointly; these conferences led to a memorandum of agreement on crew complement, initialed on December 1 by representatives of the three parties, along the lines indicated.

Meanwhile relationships between the pilots' negotiating committee and the ALPA central organization were deteriorating. Since by this time many other major air lines had concluded agreements incorporating the C and I requirement, ALPA objected strenuously to the nonconforming negotiations of the American pilots and sought,

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3 ALPA's interest in the C and I rating for the third member of the cockpit crew reflected its position that this was desirable for operating reasons, despite less stringent government requirements, and doubtless also a belief that some flight engineers would not qualify for the higher rating, thereby leaving more cockpit positions for the pilots and thus cushioning the impact of the reduction in pilot positions threatened by the introduction of the larger and faster jets.

both by resolution and by appeal to the NMB, to terminate the American negotiations until the question of crew complement was resolved in writing to its satisfaction. ALPA's efforts did not prevent initialing of the December 1 memorandum but, on December 6, American agreed with Ruby, over the dissent of O'Connell, that negotiations be recessed until January, 1963—apparently for the purpose of giving the ALPA negotiating committee and the ALPA central organization time to work out their differences. Nothing was accomplished. At meetings at ALPA's Chicago headquarters early in January, Ruby and the ALPA Executive Committee remained adamant on the C and I, whereas the American MEC resolved unanimously to authorize the negotiating committee to conclude an agreement without this. On January 11, 1963, Ruby notified the committee and American that no negotiations could occur without his approval. The same day O'Connell requested resumption of negotiations and said that any agreement would be submitted for ratification by American pilots, acting with a 75% vote which, he asserted, could readily be secured. American consulted Chairman Edwards of the NMB; he advised that the company had no choice but to bargain with the committee. Negotiations were resumed on January 16; with the ALPA staff member absent but with a Mediation Board representative always present. Ruby countered with a series of communications apprising all parties of ALPA's view that the negotiations were unauthorized and endeavoring unsuccessfully to initiate a negotiation with the ALPA home office. American asked how a new committee of American pilots could be designated; Ruby had no solution save "bringing the existing committee in or whatever arrangement was necessary." In early February the ALPA Executive Board adopted resolutions declaring that the American MEC and the

negotiating committee "are not the bargaining representative of the American Airlines pilots," and directing Ruby or his representative to negotiate and conclude an agreement with Americans. Efforts by ALPA employees to join the negotiating sessions having proved abortive, it instituted this action, on March 1, 1963, seeking to enjoin American from bargaining with anyone other than the plaintiff. American reached an understanding with its pilots on March 15. The proposed agreements referred to ALPA and provided for signature by it, which would occur unless ALPA, now confronted with a completed contract, should reverse its previous position.

The break was not long in coming. The American MEC unanimously ratified the March 15 agreements. Ruby, who was invited to some of the sessions, said he would not sign these or any other agreements not containing a C and I requirement for the third man. The MEC thereupon authorized the formation of a new organization, Allied Pilots Association, to represent the American Pilots.[4] On April 12, Allied sent out cards which would authorize it to be the collective bargaining representative of the American pilots and to seek certification under § 2 Ninth of the Railway Labor Act, 45 U. S. C. § 152 Ninth. ALPA amended its complaint to include O'Connell and the other members of the negotiating committee as additional defendants. On April 24 Allied filed an application with the NMB, stating that a representation dispute had arisen among American's pilots and asking for an investigation and certification under § 2 Ninth; it claimed to have authorization cards from 1150 out of 1600 pilots.

4 Judge Wyatt found "There is no evidence that the Company suggested, encouraged or even knew in advance about the determination of the American pilots to leave ALPA over the C and I issue and form their own organization."

The NMB promptly invited American and ALPA to submit any statements they cared to make. ALPA called the NMB's attention to this action and the allegations of assistance, influence, and coercion by American made therein. American filed a petition for leave to intervene and a letter giving its version of the facts and denying any improper conduct. On May 24, 1963, the NMB advised that Allied's application had been given a preliminary investigation by a mediator; that the Board, having "reviewed all the information now in its possession", was "of the opinion no issues have been raised which warrant further preliminary proceedings" or deferral of the processing of Allied's application pending the outcome of current litigation; and that it had directed that the application be docketed as Case No. R 3619 and that a mediator be assigned for further handling in accordance with usual procedures.[5] After receipt of further letters from ALPA's attorney, the Board, on June 5, adhered to this position. On June 13, the mediator reported he had found acceptable authorization cards from 84% of the eligible pilots and recommended that a mail ballot election be held. NMB directed that such an election be conducted. This has not occurred due to an action brought by ALPA against the members of the Board in the District of Columbia wherein the NMB has been stayed from proceeding with the election pending determination in the action now before us.

Allied responded to ALPA's District of Columbia suit by demanding, on June 19, that American recognize it and sign the March 15 agreements. Its letter pointed out that the delays were resulting "in a financial gain to American

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5 Previously the case had been known as "C-3619". We were informed at argument that the "C" Docket contains cases which are in the stage of preliminary investigation whereas the "R" Docket is for cases which are thought may be ripe for a representation election.

Airlines" and corresponding detriment to the pilots since "working conditions obviously cannot be made retroactive." A further letter, of July 3, 1963, emphasized and amplified this position, alleging that the proportion of the pilots voting for representation by Allied was now more than 90% and making the pointed suggestion "There is no restriction on the freedom of American's pilots to enforce, by whatever means necessary, their right to be represented by an organization of their own choosing." On July 9, noting "There can be no question but that the overwhelming majority of the pilots have authorized Allied to act as their bargaining representative", American recognized Allied and signed the agreements.

Meanwhile the District Court was taking evidence in this action, the hearing (which included the related claim of the flight engineers) having consumed part or all of 21 court days and the transcript extending over nearly 3200 pages. In opinions dated August 12, 1963, Judge Wyatt denied ALPA's motion for a temporary injunction and directed the summary judgment dismissing the complaint for want of jurisdiction over the subject-matter from which this appeal is taken.

More statement of the facts makes it apparent that *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943), and the two other cases decided therewith, *General Committee* v. *Missouri-K.-T. R. Co.*, 320 U. S. 323 (1943), and *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338 (1943), constitute a formidable obstacle to the maintenance of this action. The *Switchmen's* case[6] held that a district court was without jurisdiction to cancel

[6] This has been termed "Much the most important case holding that a statute inexplicitly precluded review." 4 Davis, Administrative Law Treatise 42 (1958). It is criticized by Davis and also by Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 428-31 (1958).

a certification by the NMB, under § 2 Ninth, that a particular union was the duly designated representative of certain employees, with whom "the carrier shall treat". Any attempt to distinguish the *Switchmen's* case on the basis that there has as yet been no certification of Allied runs counter to the consideration that a suit to review administrative action usually stands on a better footing than one whose maintenance would prevent an administrative agency from performing its statutory duty. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540 (1946). ALPA relies primarily on another basis of distinction, namely, that the trilogy in 320 U. S. related to jurisdictional disputes between unions rather than, as here, to action by an employer alleged to violate various commands of the Act, notably the mandate of § 2 Fourth that an employer shall not "influence or coerce employees in an effort "to induce them to join or remain or not to join or remain members of any labor organization * * *." Its two step argument is, *first*, that, by offering economic inducements to cause its pilots to desert ALPA for Allied, American was guilty of the sort of conduct held to constitute an unfair labor practice under the National Labor Relations Act in *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678 (1944), and like cases, and, *second*, that since the Railway Labor Act affords no such opportunity as the National Labor Relations Act for a full administrative hearing and determination, which would result in disqualifying a union

7 If, as is at least theoretically possible, the vote of the American pilots should favor ALPA rather than Allied, the decree sought would be unnecessary—save perhaps for the limited purpose of cancelling a contract made with a representative which turned out not to be one "duly designated." Compare *American Seating Co.*, 106 NLRB 250 (1953).

found to have benefitted from unlawful conduct by the employer,[8] the federal courts should fill the supposed statutory vacuum.

We would be unable to take the first step in the argument if that issue required resolution. Whether or not we would have been obliged to sustain an administrative determination that American had violated the statute if one had been made, we would not make any such finding on our own account—much less set aside the District Judge's contrary one. The case differs essentially from *Medo*. Although the pilots' proposal to forego the C and I requirement in return for economic benefits was doubtless to American's liking, the offer came from the ALPA negotiating committee, and did so at a time when, as American was told, there was still basis for hope that the central organization would go along. American never conditioned its willingness to grant economic benefits upon the pilots' withdrawing from ALPA; on the contrary, a solution leaving them in ALPA would have facilitated merger of the flight engineers into that organization and an amicable disposition of the entire controversy. Rather than refusing to deal with the union's bargaining representative and negotiating with the employees directly, as the employer did in *Medo*, American dealt for months with the very group with which ALPA's Constitution and By-Laws and Policy Manual told it to deal; and when an impasse developed through ALPA's refusal to accept the results of the negotiation, a refusal wholly within its rights, ALPA was unable

8. When a charge of such a practice, having *prima facie* merit, is filed before a representation election, the NLRB will customarily postpone the election until it has passed upon the charge. See *Surprenant Mfg. Co. v. Alpert*, 318 F. 2d 396, 397 (1 Cir. 1963), citing *United States Coal & Coke Co.*, 3 NLRB 398 (1937), and the NLRB's Third Annual Report (1939) 143.

to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual. American recognized Allied only when possessed of substantial evidence that Allied represented an overwhelming proportion of its pilots and when threatened with a strike if it refused recognition. Under such circumstances recognition by an employer who has not been guilty of a relevant unfair labor practice need not await certification, although he acts at peril of being right; the facts are far closer to those in *NLRB* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (7 Cir. 1954), cited in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 72 fn. 8 (1956), and in *District 50, United Mine Workers* v. *NLRB*, 234 F. 2d 565 (4 Cir. 1956), than to those in *Medo*. Compare *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, 719 (2 Cir. 1961).

However, we need not decide this issue since we find that the distinction of the *Switchmen's* case asserted by ALPA is not legally sufficient on the facts here. In both cases the basic claim is of unlawful deprivation of the important rights to representation guaranteed by § 2—in the *Switchmen's* case by the Board's allegedly unlawful selection of a bargaining unit, here by the Board's allegedly unlawful condonation of illegal tactics by American. It was obvious almost from the beginning of this action that it concerned the proper representation of American's pilots, a subject which Congress has given the Mediation Board the duty to determine.

Appellants seek to bring themselves within two areas heretofore recognized as appropriate for judicial intervention in Railway Labor Act matters—the duty of the courts to require the carrier to bargain with the duly designated representative, *Virginian Ry. Co.* v. *System Federation No.*

40, 300 U. S. 515 (1937), and, very likely, when necessary, a duty to require the Mediation Board to do what Congress commanded, namely, to investigate and certify—the point reserved by the Supreme Court in the *M.K.T.* case, 320 U. S. at 336 fn. 12; cf. *Order of Railway Conductors* v. *Pennsylvania R. Co.*, 323 U. S. 166 (1944), and decided in *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir.), cert. denied, 342 U. S. 849 (1951). The case does not fall within the first of these principles. For, even though we accept appellants' argument that, in the light of § 2 Second, Fourth and Sixth, it is not fatal that ALPA never had been certified so as to come within the precise command of § 2 Ninth that the employer "treat with the representative so certified", the courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute requiring the intervention of the Mediation Board under § 2 Ninth—a development which became an almost inevitable prospect within a few weeks after this action was brought on March 1 and crystallized into a certainty by late April.

Appellants have likewise failed to make a case for invoking the second possible judicial role. The Board's duty to investigate is a duty to make such investigation as the nature of the case demands. See *WES Flight Engineers Int'l Ass'n* v. *National Mediation Board*, 314 F. 2d 234, 237 (D. C. Cir. 1962), a decision which weighs heavily against ALPA's entire claim.[9] We are not required to decide whether relief for failure of the Board to make a proper investigation could ever be granted in an action to

[9] For reasons indicated above, we find no merit in ALPA's distinction of the *WES* case on the basis that there the suit followed whereas here it preceded certification.

which the Board is not a party. For the record shows that the Board performed its duty. True, no testimony was taken, as it was in the *WES* case, but the Board's manner of investigation was not only as good but better under the circumstances. As we are told by an affidavit of its Assistant Executive Secretary, it utilized pleadings, exhibits, and portions of the record already made in this action, which each of the three members reviewed. In addition it had the important benefit of its own intimate knowledge of the negotiations, derived from the participation of its representatives therein. ALPA has told us of no additional material facts it would have presented if the Board had given it a further opportunity; its complaint relates not so much to the adequacy of the information before the Board as to the Board's conclusion that no wrong had been done. We see no more basis for judicial interference with that conclusion than with the conclusion in the *Switchmen's* case that the New York Central's yardmen should vote on a system-wide basis. See 320 U. S. at 301, 305. Compare *General Committee v. Missouri-K.T.R. Co., supra*, 320 U. S. at 337; *Brotherhood of Railway and Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715 (1943), *reversing per curiam* 137 F. 2d 817 (D. C. Cir. 1943); *UAL Chapter, Flight Engineers Int'l Ass'n v. National Mediation Board*, 294 F. 2d 905 (D. C. Cir. 1961), cert. denied, 368 U. S. 956 (1962); *Air Line Stewards Ass'n v. National Mediation Board*, 294 F. 2d 910 (D. C. Cir. 1961), cert. denied, 369 U. S. 810 (1962); *Flight Engineers Int'l Ass'n v. Eastern Air Lines, supra*, 311 F. 2d 745.

ALPA persistently reminds us how differently the case would have been treated if American had been a bus line subject to the National Labor Relations Act rather than an

airline subject to the Railway Labor Act.[10] But the claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed. The Railway Labor Act constituted "legislation agreed upon between the railroads and the Brotherhoods and probably unique in having been frankly accepted as such by the President and Congress." " * * * [E]very stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions * * *." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 752-53 (1945) (dissenting opinion of Mr. Justice Frankfurter). The special situation in the railroad industry, where strong unions and management had become used to dealing with each other, differed vitally from the host of problems at which the Wagner Act was aimed—businesses of every size and description, many with a history of strong anti-union bias and with ample opportunity for strong-arm tactics. It was thus natural that the Wagner Act should stress administrative adjudication whereas the earlier Railway Labor Act relied primarily on mediation. For the courts to require the Mediation Board to transform itself into an adjudicative and prosecutorial agency like the N.L.R.B. or to impose themselves upon it would distort the entire Congressional scheme. Moreover, Congress evidently considered the railroad and, later, the

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10 It is, however, by no means clear that the National Labor Relations Board would have found *prima facie* merit in ALPA's complaint. See note 8 *supra*.

air transport industry to be so heavily charged with public interest as to make speed in the disposition of disputed questions of representation peculiarly vital. The thirty day period which Congress gave the Mediation Board to investigate and certify under § 2 Ninth is to be contrasted with the 475 days reported a few years ago to be the average time lapse between the filing of a charge and final decision of the NLRB, Organization and Procedure of the National Labor Relations Board. Report to the Senate Committee on Labor and Public Welfare, S. Doc. No. 81, 86th Cong. 2d Sess. (1960), pp. 1-2, and with the nearly six months which were here required for full hearings, briefing and decision by an effective judge in the District Court. Considerations such as these, and others marshalled in the opinions in the *Switchmen's* and *M.K.T.* cases, underlay the Court's conclusion that, as to the Railway Labor Act, "The inference is thus strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." 320 U. S. at 333; see also 320 U. S. at 302. "There was to be no dragging out of the controversy into other tribunals of law." 320 U. S. at 305. Contrast *Leedom* v. *Kyne*, 358 U. S. 184, (1958).

Appellants argue that if the District Court had "jurisdiction" when the suit was filed in March, before Allied even existed, this could not have been lost because the Mediation Board concluded in May that there was a representation dispute between ALPA and Allied and that the latter was not disqualified. But it had become apparent, long before Allied's application to the Mediation Board, that this action was subject to the vice that it sought orders from a federal court that might frustrate ultimate deter-

mination by the agency to which Congress gave exclusive responsibility; the action should have been dismissed as soon as this appeared. See *Division 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F. 2d 17 (4 Cir.), cert. denied, 369 U. S. 885 (1962). The obstacle in a case like this is not truly lack of "jurisdiction" in the basic sense of a lack of power in the court "to determine whether it [the claim] was or was not well founded in law and in fact," *Lauritzen* v. *Larsen*, 345 U. S. 571, 575 (1953); rather, as Mr. Justice Jackson there went on to explain, "As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter." Compare *Bell* v. *Hood*, 327 U. S. 678 (1946). Whether such a "barrier" is apparent the very instant that suit is brought or becomes so later, the court is bound to dismiss.[11]

Affirmed.

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11 In view of this conclusion, it is unnecessary to consider appellees' contention that injunctive relief was barred by §§7 and 8 of the Norris-LaGuardia Act, 29 U. S. C. §§ 107, 108.

Judgment Sought to be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of September one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

CHARLES H. RUBY, as President of the Air Line Pilots Association, International & ano., etc.,
Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellee,

and

NICHOLAS J. O'CONNELL, JR., etc., et al.,
Additional Defendants-Appellees,

and

JOSEPH V. MANNING, etc., et al.,
Intervenors.

Appeal from the United States District Court for the Southern District of New York.

Judgment Sought to Be Reviewed

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee American Airlines, Inc.

A. Daniel Fusaro,
Clerk

Filed September 16, 1963.
A. Daniel Fusaro, Clerk.

Opinion on Motions for Preliminary Injunction

WYATT, *District Judge.*

This action and the controversies involved form chapters in the troubled history of labor relations in the airline industry. Specifically there are charges here of violations of the Railway Labor Act (45 U.S.C.A. 151 and following: the "Act") which was made applicable to the air lines by amendments effective April 10, 1936 (45 U.S.C.A. 181).

The action is for an injunction, declaratory judgment and damages and was commenced by President Ruby of Air Line Pilots Association ("Alpa") and by Alpa against American Airlines, Inc. ("American" or "the Company"). Intervention under Fed. R. Civ. P. 24(b), was permitted to President Manning of American Airlines Chapter, Flight Engineers' International Association (the "Chapter"), and to the Chapter; it was represented that there were questions of law and fact in common. The intervenors filed a complaint also for an injunction, a declaratory judgment and damages.

Thereafter intervenors applied under Fed. R. Civ. P. 21 to add as additional defendants Nicholas J. O'Connell, Jr., Chairman of the Alpa Master Executive Council of American pilots (the "American MEC"), and also the members of the Negotiating Committee appointed by the American MEC (the "additional defendants"). After this application had been granted, the intervenors and also plaintiffs served amended complaints which added averments respecting the additional defendants, the motions are considered on the basis of these amended complaints.

The motions now to be considered in motion by plaintiffs for summary judgment and a motion by defendant to:

strike an affidavit, etc. will be dealt with separately) are five in number:

1. by plaintiffs for a preliminary injunction restraining American

   a. from negotiating with the additional defendants as a committee of pilots;

   b. from refusing to negotiate with Alpa;

   c. from influencing, etc. its pilots in their choice of bargaining representatives;

   d. from "subverting" the rights of Alpa as bargaining representative of American pilots;

   e. from making any agreement as to pilots except with Alpa; and

   f. from changing working conditions in violation of the Act;

2. by American for a reference to a master under Fed. R. Civ. P. 53 to determine whether "a majority of defendants' flight deck employees desire the Joint Negotiating Committee to continue to act as their bargaining representative";

3. by intervenors for a preliminary injunction restraining American

   a. from negotiating as to flight engineers except with the Chapter;

   b. from making any agreement as to flight engineers except with the Chapter; and

   c. from refusing to bargain collectively with the Chapter;

4. by intervenors for an order restraining all parties, including the additional defendants

   a. from disseminating a proposed agreement concerning flight engineers;

   b. from holding any meetings for considering and voting on such proposed agreement; and

   c. from influencing etc. the flight engineers in their choice of bargaining representative; and

5. by plaintiffs for an order restraining the additional defendants

   a. from negotiating with American as to pilots;

   b. from acting with respect to agreements negotiated by them with American;

   c. from influencing etc. the pilots in their choice of bargaining representative;

   d. from "subverting" the rights of Alpa under the Act;

   e. from making any agreement as to American pilots except through Alpa; and

   f. from participating in any change in working conditions in violation of the Act.

1. *Relationship between Alpa and American; Internal Structure of Alpa*

Alpa is a national labor organization organized in 1931 and with Home Office in Chicago. For many years, going back at least to 1939, there have been written agreements between American and its pilots, represented by Alpa

These agreements have been signed by the President of Alpa "for the air line pilots in the service of" American. The last agreement is dated, and became effective, January 21, 1959. It provides that it shall be renewed each year without change unless notice of an intended change is given by one party to the other under Section 6 of the Act (45 U.S.C.A. § 156).

Alpa has been recognized by American for many years as the representative of its pilots. There has not been, until recently, any "dispute" concerning representation which would bring about a certification by the National Mediation Board ("NMB"; 45 U.S.C.A. § 152 Ninth); the January 21, 1959 agreement recites that Alpa has given "satisfactory proof" of its representation but this recital is a carry-over from earlier years; no proof was in fact given or required and there is no evidence that Alpa was ever chosen as bargaining representative for the American pilots by any ballot or other formal procedure.

The representation by Alpa with which we are here concerned is of American pilots only, and not of pilots on other air lines. This has been the past pattern, the agreements have been executed on such basis, and it appears to be required or contemplated by the Act (e.g., 45 U.S.C.A. § 151 Fifth and 152 Fourth and Ninth); Alpa policy is firm for negotiations "individually with each carrier" and against "industry bargaining".

In this connection, the internal structure of Alpa should be noticed.

For each air line, the fundamental unit is the Local Council, one of which is established at each important base of the air line. The Alpa members in each Local Council elect a Captain Representative and a Co-pilot Representative.

Opinion on Motions for Preliminary Injunction

The Captain Representatives and the Co-pilot Representatives from all the Local Councils of an air line make up the Master Executive Council ("MEC") of that air line.

The MEC elect a Chairman (called "Master Chairman") and a Vice-chairman.

For each air line there is also a Negotiating Committee, which under Alpa policy is selected or elected by its MEC; the Master Chairman is ex-officio a member of the Negotiating Committee.

Such was the Alpa organization at American. During the relevant period the additional defendant O'Connell was Master Chairman; the Negotiating Committee was composed of Lyons (Chairman), Guba, Gartley, Atkins, Miller (until his resignation February 18, 1963) and Master Chairman O'Connell (ex-officio).

The highest governing body of Alpa is its Board of Directors, made up of the Captain and Co-pilot Representatives of all the Local Councils of all the air lines whose employees are represented by Alpa.

The Executive Committee of Alpa consists of the officers, these being the President, First Vice-President, five Regional Vice-Presidents, a Secretary and a Treasurer.

There is also an Executive Board of Alpa consisting of the Chairman and Vice-Chairman of the Master Executive Council of each air line.

2. *The Crew Complement Issue Between Alpa and Fcia (or its local chapters)*

To act as pilot of any plane, large or small, requires possession of the appropriate certificate under applicable government regulations. There are various types of cer-

tificates, some of which are: student, private, commercial pilot, and airline transport pilot. A commercial pilot's certificate (and "instrument rating") is required to act as a pilot on a commercial passenger plane; the pilot in command must hold appropriate airline transport pilot certificates and ratings. 14 CFR § 40.300.

The addition of a flight engineer to plane crews came about with the development of larger passenger planes during and after World War II. In 1948 new government regulations required that the crew of large planes include the holder of a flight engineers certificate.

Some carriers, including American, then employed flight engineers with a mechanical background and a flight engineer's certificate but without pilot qualifications. These flight engineers have been historically represented for collective bargaining purposes by Flight Engineers' International Association ("Feia"); the Chapter is the local unit for American, has been certified since 1935 by the National Mediation Board ("NMB") as authorized to represent American flight engineers (45 U.S.C.A. § 152 Ninth), and has had contracts with American concerning working conditions until the last contract expired according to its terms on April 30, 1963.

Other carriers employed as flight engineers qualified pilots who also held flight engineer's certificates. On such carriers, Alpa represented all crew personnel and there was thus one union in the cockpit.

On carriers such as American there were, as indicated above, two unions in the cockpit.

Applicable regulations require a crew of three for larger planes, including jets, and one crew member must have a flight engineer's certificate. All three *may* be qualified pilots, provided one has a flight engineer's certificate, or it is sufficient that two only are qualified pilots and that

the third holds a flight engineer's certificate without pilot qualifications.

Alpa has vigorously fought for what it calls a "fail safe" policy under which all three members of the jet crew must be qualified as pilots (meaning possession of at least a "Commercial Pilot's Certificate and Instrument Rating", usually referred to in short as "C and I"), even though one acts as flight engineer. Feia and its chapters fight against a requirement of any pilot qualifications for the flight engineer. This issue is usually called the "crew complement" issue. While supported on each side by safety arguments, the difference in attitude between Alpa and Feia must be to some extent influenced by the struggle over jobs and union membership.

In order to keep labor peace, American and certain other carriers have been flying large planes with a crew of four (three qualified pilots and a flight engineer).

American and the other carriers so situated naturally and properly desire (and feel compelled by the laws of economics) to reduce the cockpit crews to three members as permitted by the regulations and as presently believed on all sides to be entirely adequate for safety.

It is this crew reduction and the handling of the third seat for the flight engineer which is the root cause of the present litigation. In particular, the immediate cause of controversy is that Alpa, a national organization, insists on a *national* policy that all three members of the reduced crew must have at least a "C and I"; the Negotiating Committee for American pilots (despite this national policy of Alpa) was willing to agree with American that the flight engineer member need not have a "C and I" (while conforming with all governmental safety regulations) pro-

vided the American pilots secured benefits from American in return, such as reduced hours, etc.

3. *Reports of the Feinsinger Commission*

On February 17, 1961, the flight engineers walked out on American and the other major air carriers similarly situated. This forced a virtual stoppage of air transportation.

The walkout resulted from a controversy before the NMB between Alpa and Feia.

Alpa had requested certification by NMB as representative of *all* cockpit crew members (engineers included) of United Air Lines. Feia contended to NMB that flight engineers were a separate "craft or class (45 U.S.C.A. § 152 Ninth) and should vote separately from pilots for representative.

NMB appointed "a committee of three neutral persons" (45 U.S.C.A. § 152 Ninth), the Chairman being J. Glenn Donaldson, to decide this dispute.

The Donaldson Committee on January 17, 1961 made a decision that all crew members in the cockpit — whether pilots or flight engineers — are "one craft or class" and should vote together "on one ballot" for a bargaining representative.

This was, of course, a victory for Alpa and the walkout of flight engineers took place as a protest one month later.

On February 21, 1961 the President appointed a Commission, with Professor Nathan Feinsinger as Chairman, to investigate and report; the engineers returned to work.

The Feinsinger Commission made a preliminary report on May 24, 1961. The principal recommendations were:

a. that there be one union in the cockpit and that Alpa and Feia should merge;

b. that jet planes operate with a three man crew;

c. that flight engineers on jet planes (subject to job protection in a transition period) be qualified as pilots (that is, have a "C and I"); and

d. that job equities of the then pilots and engineers be reasonably protected.

The President declared that the parties should "negotiate a final settlement of their differences on the basis of these recommendations."

The Feinsinger Commission submitted a supplemental and final report on October 17, 1961 which expanded some of its recommendations, principally (a) as to the detailed pilot qualifications to be expected of flight engineers on jet planes (which included possession of a "Commercial Pilot's Certificate and Instrument Rating") and (b) as to methods of protecting job equities.

The recommendations of the Feinsinger Commission did not lead to any quick agreement between the pilots, engineers and any air lines. There were further negotiations as to each air line.

For example, Pan American and Alpa, after much negotiation, accepted a request made by the President and on April 17, 1962 agreed to arbitrate their differences. The Pan American engineers declined to arbitrate. This particular dispute engaged the attention in July 1962 of the Court of Appeals for this Circuit. *Pan American World Air* v. *Flight Eng. Intern. Assoc.*, 306 F. 2d 840 (2d Cir. 1962).

It proved impossible to settle in any way the disputes as between Eastern Airlines, its pilots and engineers. A crippling strike was started against Eastern by its flight engineers on June 23, 1962. Some aspects of this were before Judge Feinberg last year in *Flight Engineers Int. Ass'n. EAL Chap. v. Eastern Airlines*, 208 F. Supp. 182 (S.D.N.Y. 1962), affirmed 311 F. 2d 745 (2d Cir. 1963).

The situation as to American will be examined in greater detail.

4. *Pilot Negotiations and Mediation before the TWA Settlement*

Negotiations began between American and its pilots (through Alpa) by the service of "openers" in March 1961 by American and by Alpa (acting through President Sayen) under Section 6 of the Act (45 U.S.C.A. § 156). The American "opener" was addressed to the President of Alpa in Chicago.

Meetings were held from time to time in 1961 between American (whose principal representatives have been Vice-presidents Whitacre and Lamond) and the Negotiating Committee. According to practice, the Alpa Home Office in Chicago participated in such meetings through a paid employee (called a "staff negotiator") who reported back to the Home Office. Harkenrider was Alpa staff negotiator with the American Negotiating Committee until withdrawn on November 28, 1962 as later described. It was not usual for any Alpa officer to take part in the negotiations, except in such a case as Miller who was an American pilot and member of the Negotiating Committee and was also a Regional Vice-president of Alpa.

Agreements were not reached in 1961 (possibly waiting on or observing the Feinsinger Commission) and on September 21, 1961 Alpa asked NMB for its mediation services.

On October 21, 1961, American notified Alpa that it accepted the recommendations of the Feinsinger Commission and added them to its Section 6 openers; specifically mentioning the crew complement recommendations.

The situation in American was importantly and significantly affected by the desires (known to the Alpa Home Office) on the part of American pilots for a reduction in hours, an improved retirement plan, and other changes. Alpa President Sayen on November 7, 1961 wrote the NMB that the crew complement problems were "but minor issues on American Airlines" compared to the pilot proposals on retirement and working conditions. While American was willing to accept the Feinsinger Commission recommendations, it evidently did not feel that it could afford to train its flight engineers at its expense to comply with these recommendations and also at the same time grant to its pilots reduction in hours, better retirement treatment, etc.

A mediator from NMB (Michael or "mediator O'Connell", to distinguish him from the additional defendant O'Connell) had been designated in due course and was attending the pilot negotiations but by June 29, 1962 the pilot situation on American was at a stalemate. The pilots insisted on a reduction in hours, etc.; American insisted that it was impossible to grant these benefits in the face of the expected expense of training flight engineers to secure pilot qualification, the major expense being the qualification of flight engineers with a "commercial pilot's certificate and instrument rating." The mediator felt that an impasse had been reached.

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On July 2, 1962, NMB notified the parties that mediation had been unsuccessful and urged an agreement to arbitrate (45 U.S.C.A. 155 First).

American accepted the proffer of arbitration but on July 11, 1962 Alpa declined it.

NMB therefore on July 18, 1962 notified the parties that its services had been terminated; this meant that after the thirty day period under the Act, the parties were free from the Act's restrictions (45 U.S.C.A. 155 First).

5. Flight Engineers-Negotiations and Mediation Before the TWA Settlement

The last agreement executed between the Chapter and American was effective May 1, 1958 and was to continue until April 30, 1963 except that "openers" under Section 6 of the Act were permitted to be served as to compensation provisions (Sections 5 and 6 of the May 1, 1958 agreement) to be effective not earlier than May 1, 1961. American by the agreement recognized the Chapter as "duly designated bargaining representative" of its flight engineers as certified by NMB (the certification had been made on May 25, 1955). Unlike Alpa which has Local Councils at each important base, the Chapter includes all flight engineers at all American bases.

In February 1961, Section 6 "openers" as to compensation were served by the Chapter on American and by American on the Chaper.

The Chapter had a Negotiating Committee on which were President Manning, Apkarian Petree and Simpson; unlike Alpa (where the Negotiating Committee was elected by the pilot's MEC), the flight engineers' membership at large elected the Negotiating Committee, the last such election having been held in March or April 1961.

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There were negotiating sessions between the flight engineers and American in August and October 1961 but no agreement was reached, again probably because of the developments associated with the Feinsinger Commission.

There were other negotiating sessions in January and March 1962; the engineers believed, however, that American would not negotiate to a conclusion on their wages until the crew complement issue had been settled. Accordingly on March 14, 1962 the Chapter asked NMB for mediation.

Thereafter the NMB assigned Holaren as mediator and meetings took place; that these were unsuccessful was doubtless because of the unresolved crew complement issue and the then pending proceedings in this connection before Presidential Emergency Boards involving other air lines.

NMB recognized mediation as unsuccessful and urged an agreement to arbitrate (45 U.S.C.A. § 155 First). On June 19, 1962 the Chapter refused arbitration and NMB then on June 21, 1962 terminated its services, leaving the parties—after the statutory 30 day period—free from the Act's restrictions (45 U.S.C.A. § 155 First).

6. TWA Settlement and Resumption of Negotiations on American

On June 21, 1962, then Secretary of Labor Goldberg was able to announce that TWA and its flight engineers had settled the crew complement issue, subject to ratification by the engineer membership. The settlement was made on the basis of the Feinsinger Commission recommendations, including an eventual merger of the TWA Chapter of Feia into Alpa and possession of a "C and R" by the flight engineer member of three man crews. Unresolved economic issues were to be arbitrated.

This TWA settlement came about after a serious situation had been created by a strike notice from its flight engineers to TWA and after an Emergency Board had been appointed by the President (on March 20, 1962) under Section 10 of the Act (45 U.S.C.A. § 160).

7. *Washington, July 1962—Pilots and Flight Engineers Meet Separately with American*

After the settlement between TWA and its flight engineers had been announced on June 21, 1962, the Labor Department officials wished to encourage a similar and prompt settlement on American. Among other reasons, this was expected to help toward ratification by the TWA flight engineers of the TWA settlement and to help toward settlement on Pan-American and Eastern (whose flight engineers had rejected the TWA settlement and announced a strike for June 23, 1962, which began on Eastern but not on Pan-American); at the same time, a long range labor solution on American itself (a most important domestic carrier) would obviously be in the public interest.

After being so requested by the Labor Department, the Chapter (through its MEC acting unanimously) on July 6, 1962 approved the terms of the TWA settlement as a formula for settling the crew complement issue on American. The Secretary of Labor promptly announced this in a press release.

The Labor Department officials then requested the flight engineers and American to meet with them in Washington; they did so in the week of July 9, 1962.

These officials brought the Company and the flight engineers' committee together for a series of meetings that week in Washington, proposing the TWA formula as the basis for crew complement settlement. The engineers were

primarily interested in discussing wages at once, but little progress on this could be made; they were told by the Company to forget about crew complement until it could be negotiated with the pilots.

The Company representatives explained privately to the Labor Department officials that the problem on American was not so much with the engineers as with the pilots, this because the American pilots were far more interested in reduction of hours and other benefits (which could be very expensive for the Company) than in crew complement. In this connection, it was also explained that the American pilots as far back as 1958 had wanted a reduction in hours, etc. rather than the agreement for a four man crew, and that the agreement for a four man crew had been made by American with then President Sayen of Alpa. In fact, the American pilots had suggested to the Company as recently as May of 1962 that they were not interested in having the Company spend its money to qualify flight engineers with a "C and I" under the Feinsinger Commission formula; they wanted a reduction of hours and other benefits instead.

The Secretary of Labor, after considering this explanation by the Company, arranged to bring the pilots to Washington; in the week beginning July 16, 1962, representatives of the pilots, of the engineers, and of the Company were in Washington. Meanwhile, President Ruby of Alpa had also come to Washington by request; he (a long time pilot for National Airlines) had just been elected in June as President of Alpa.

The engineers played little part in the Washington meetings which began July 16; they did not see the Company team at any time; they had one meeting with the pilots;

and on July 20 they were excused by the Secretary while the Company and its pilots negotiated.

At the request of the Labor Department officials and with the participation of Chairman Edwards of NMB, the pilots and the Company worked steadily in Washington from July 16, 1962 until July 25, 1962.

The effort, under suggestions from Chairman Edwards, was first to try to agree on as many items as possible, and leave to one side those items on which it appeared difficult to agree. Thus many provisions were in fact agreed upon, but these are of no significance here.

Ruby of Alpa was present at many of these meetings and Harkenrider of Alpa was present at all of them (and at all other pilot meetings with the Company until his removal by Alpa on November 28, 1962); the agreed items were in fact initialed by Harkenrider for the American pilots.

The differences between the Alpa national organization and the Alpa local American organization—those differences which finally led to the present litigation—became more evident in Washington July 1962 to those organizations, as well as to the Company itself.

For example, Ruby met informally with the Company and two of the chief pilot negotiators at the Hay-Adams Hotel on July 22. O'Connell, one of the chief pilot negotiators and now an additional defendant, there made it clear that his group was primarily interested in reduction of hours and other benefits and if it were necessary to save the Company money on flight engineer training in order to secure such benefits, his group would consider agreeing to a reduction in flight engineer training below that required for a "C and I" as recommended by the Feinsinger Commission. While thus put on notice, Ruby did

not agree and stated a contrary Alpa position. O'Connell had earlier the same day in an open meeting, with Chairman Edwards present, stated that the crew complement problem on American was "inversely related to reduction in hours."

The Washington meetings were adjourned on July 25 and, at the suggestion of Chairman Edwards, were to be resumed on July 31, in Fort Worth.

8. *July 31-November 1 Negotiations Between Pilots and American*

The meetings in Fort Worth (July 31-August 2) between the pilots and the Company, with Chairman Edwards present, were significant because the basis was there established for all subsequent negotiations.

The pilots, through O'Connell, made a proposal during these meetings which (apart [illegible] details not here significant) was that if the Company would grant them reduced hours and an improved retirement plan, they on their side would agree to a three man crew without insisting that the flight engineer have a "C and I" (thus saving the Company expensive training), and would bring the engineers not only into such an agreement but also into a merger with Alpa so that the Feinsinger Commission recommendation of one union in the cockpit would be accomplished.

This proposal came from the pilots, not the Company, and was often called "O'Connell's iffy"; in fact the proposal came from Alpa itself because the Negotiating Committee was at the time (and for a considerable period thereafter) functioning as an official Alpa bargaining committee with an Alpa Home Office staff member in constant attendance. Since the proposal conflicted, however, with

the strong position theretofore taken by the Alpa National organization, the Company raised the question in Fort Worth and later whether the pilots could secure an Alpa approving signature. The pilots were apparently confident that the Alpa Home Office would go along and told the Company team that Alpa policy had been changed at its last convention and that they (especially Garvey) had a good deal to do with Alpa policy in this area. Moreover, Miller, a Regional Vice President of Alpa, was a member of the pilots' Negotiating Committee and was at the Fort Worth and many other meetings; Harkenrider, the Alpa staff negotiator, was also there and at all other meetings until late November. The American pilots did not at this time contemplate any break away from Alpa.

The Company team was interested, felt that the one union condition was (among other things) highly important, and asked for a recess so that the cost of the proposal could be calculated.

There was then a series of meetings between the Company team and the pilot's team at Washington, Los Angeles and New York.

These meetings, and all other negotiating meetings relevant here (except those about pilot-flight engineer merger into one union), were attended by Chairman Edwards of NMB or mediator O'Connell or mediator Schoonover; sometimes Chairman Edwards and one of the other mediators would both attend. All the negotiating meetings indicated were either arranged by, or the time and place had the approval of, the NMB personnel.

There were still many vexing issues between the Company and its pilots, even though their main objectives may have become common. For example, how much of a reduc-

tion in maximum work hours per month should be made? The pilots wanted a low figure, the Company a higher figure than the pilots.

Finally, in middle or late September, the Company and pilots felt sufficiently agreed in principle that they suspended their meetings to permit O'Connell and his pilot committee to deal with the flight engineers and bring about their agreement to the contemplated arrangement with the Company and to a merger agreement with Alpa.

9. *Pilots—Flight Engineers Talk Merger; July-November 1962*

In mid September 1962 when the settlement plan proposed by O'Connell in Forth Worth had thus been made the basis of an agreement with the Company in principle, the pilots turned to talks with the engineers in order to secure their acceptance of the plan, including merger with Alpa.

An opening had already been made for these talks. O'Connell had explained his plan to Chapter President Manning in July even before presenting it to the Company. The day after the Fort Worth meetings adjourned, O'Connell and Harkenrider met in New York on August 30 with Manning and with Chapter counsel; they also met in Los Angeles with Manning alone before the talks there on August 29 and 30 between the pilots and the Company.

The engineers were certainly prepared to accept as satisfactory everything to be done by American under the O'Connell plan. While they had accepted the recommendations of the Feinsinger Commission, the requirement of a "C and I" for the flight engineer was no article of faith with them; quite the contrary. Accordingly, if the pilots were willing to agree with the Company to eliminate this

particular recommendation, the flight engineers would have no objection.

Acceptance by the American Chapter of the Feinsinger Commission recommendations had meant acceptance of the principle of one union for all cockpit employees. To put this principle into practice, however, was a matter of some difficulty.

From about mid or late September 1962 to the end of October 1962, the pilot's committee and the flight engineer's committee met in New York (no mediator or any other third persons being present) and discussed the terms on which the Chapter would be merged into Alpa. The flight engineers did not negotiate with the Company during this period, but talked with the Company team on September 21 and in mid-October to confirm the Company's attitude as reported by the pilots and to exchange general views.

The merger negotiations were based on merger of the Chapter into Alpa and its constitution, by-laws and policy manual—at the insistence of the pilots—were to be controlling. The flight engineers were told by the pilots, as the Company had been told, that Alpa would go along with an agreement even though a "C" and I" for all crew members was not required.

By the end of October, an agreement of merger had been almost completed, but some important points had not been resolved.

One of these was the pay relationships between flight engineers and pilots. The engineers were giving up to Alpa their separate representation as against the Company, so that after the merger wages for engineers would be negotiated by Alpa. There are about 600 flight engineers

employed by American as against about 1600 pilots. It was therefore desired to put into the agreement some percentage figure as to minimum relationship between the two pay scales, so that there could be some standard for future negotiations. It proved impossible to agree readily on this percentage figure, but it was agreed between pilots and engineers that the Chapter negotiating committee would separately negotiate with American on engineer wages for the contract then to be made, and that the engineer wage thus negotiated would form the basis for the pay relationship with pilots to be inserted in the merger agreement.

By the end of October and after much time had been spent by the pilots and the engineers trying to agree on all points, the Company appeared impatient to start formulating a crew complement agreement. At the suggestion, or at least with the approval, of Chairman Edwards, the pilots and engineers agreed to put their merger talks to one side for the time being and to sit down with the Company on the crew complement issue.

10. *First Joint Pilot-Flight Engineer Negotiations with American; Crew Complement Agreement at December 1, 1962*

The first meeting of the Company jointly with the pilots and the flight engineers was on November 1.

Reports as to the merger negotiations of the two unions were made to the Company by O'Connell for the pilots and by Manning for the engineers. It was plain from these reports that merger was still a thing of the future.

Manning explained the understanding of the engineers that, although a crew complement was now to be discussed, it was to be effective only as part of an over-

all agreement which would include merger agreement between the two unions, a basic working agreement for pilots and engineers (including pay provisions for engineers), etc. Either Manning or Schwartz (Chapter counsel) or both referred to the fact that both pilots and engineers would be "pilots" under the contemplated arrangements, all would be one, and O'Connell would speak for all in the negotiations.

The crew complement discussions lasted off and on all during November. The engineers spoke frequently for themselves, their counsel likewise. The pilots and the engineers made separate written proposals to the Company.

These discussions finally resulted in an agreed document setting forth the provisions to govern the crew complement reduction from four men to three men. This document was initialed on December 1, 1962 by O'Connell for the pilots, by Manning for engineers, and by Whitacre for the Company. The initialed document was then given to mediator O'Connell, who later gave it to Chairman Edwards.

Harkenrider, the Alpa staff negotiator, had been withdrawn (for reasons shortly to appear) by Alpa on November 28, 1962, just before the initialing.

The December 1 crew complement document was drawn as a "memorandum of agreement" between, and to be executed by, the Company, Alpa and the Chapter. Some of its important provisions were:

a. the Company can convert to a 3-man crew on jet planes;

b. the present American flight engineers are "pilots" under the agreement; when serving as flight officers; and they may qualify by having "any type

of pilot certificate" (that is, less than a "C and I"; for example, a student's certificate) and by taking certain prescribed training;

c. the present American flight engineers are to be consolidated with the pilots "into one unit . . . for the purpose of collective bargaining representation" and it is represented that a majority have chosen Alpa "as their exclusive collective bargaining representative"; and

d. the Chapter "irrevocably relinquishes any right it may have to represent employees of the Company" and "acknowledges" that the Company may treat Alpa as the "exclusive collective bargaining representative" of the present American flight engineers.

The December 1 crew complement document settled many of the important and vexing problems as between American, its pilots and its engineers but—whatever the significance of the initialing may have been—it was, as Whitacre testified, "subject to a complete agreement". That "complete agreement" has never been reached.

Nothing which was said or done in these joint negotiations justified the Company in believing that the engineers had given up their representation rights to a "joint committee" or otherwise. It was clear that the giving up would only occur *after* a complete and overall agreement had been reached by all parties, which unfortunately never came to pass.

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II. *Rift Within Alpa; Recess of the Negotiations in December*

From at least August 2 (Fort Worth), the Alpa national organization and the Alpa local American organization were each set on a collision course. Only a change of direction by one or the other could have avoided the collision, the legal effects of which are now to be determined.

The Alpa national organization was insisting that each member of a 3 man crew must have a "C and I". Any chance of a relaxation of such policy or of a compromise by Alpa disappeared with developments on the other large air lines.

On September 25, 1962, an agreement was executed by Ruby (for Alpa) acting for all TWA pilots, and by TWA, providing (among many other things) for a "C and I" for all members of a 3 man crew on TWA. The TWA engineers ratified the settlement and executed their agreement on November 21, 1962.

On September 7, 1962, Ruby had executed a similar agreement (for Alpa) acting for all Pan-American pilots.

After the strike of flight engineers on Eastern (which began June 23, 1962) had dragged on for several months, Eastern made some arrangement with Alpa under which pilots (with the necessary flight engineer's certificate) took over the seat of the flight engineer; thus on Eastern all members of a 3 man crew have at least a "C and I".

According to Ruby, by January 1963 all of the air lines except American and Trans Caribbean were operating under a "C and I" requirement for all members of a 3 man crew.

Against this background, it seems clear that Alpa as a national organization would find it difficult to make a pol-

ley exception so that American would be the only major air line without the expensive "C and I" requirement for flight engineers.

The elected representatives of the American pilots (its Alpa MEC) and the appointed Alpa Negotiating Committee were ready and willing, however, to make a trade with American under which they would receive a reduction in hours and an improved retirement plan against waiver of any "C and I" requirement for the flight engineer. There is nothing surprising or unreasonable about such an attitude.

The Company thus found itself between these two opposing positions, but would naturally attempt to find an accord with its own employees. It therefore accepted in principle the proposal made by its pilots, at an Alpa Negotiating Committee, in Fort Worth about August 1.

Ruby did not learn of the Fort Worth proposal until about the middle of September. He then promptly sat down with the American committee and made it clear that he would insist that a "C and I" for the flight engineers be part of any settlement. The pilots insisted that they preferred, and would demand, a reduction in hours. Ruby apparently felt that both were possible; in this, he was mistaken.

In October, Ruby had apprehensions as to the course of negotiations and asked O'Connell to attend an Alpa Executive Committee meeting in Chicago on October 23. O'Connell did so. He apparently gave the position of his group with frankness, because Ruby says the Executive Committee then "found out definitely" that the American pilots were not insisting on a "C and I" for the flight engineer. The Alpa Executive Committee adopted a resolution informing the American pilots that Alpa policy "re-

quires a Commercial and Instrument Rating" for the third crew member and that "this concept must be met". Miller was the only pilot from American on the Executive Committe and if present at the meeting he abstained on the vote.

Ruby met with O'Connell and the American Negotiating Committee on November 1 and 2 and again asserted their obligation to follow Alpa "mandatory policy" as to flight engineer qualifications. Ruby outlined his idea of how they should negotiate, they agreed to try it out, but Ruby could see that they were reaching an "adamant position."

As November wore on and the American pilots remained "adamant", Ruby again referred the matter to the Alpa Executive Committee which on November 27 advised that **Harkenrider be removed as staff negotiator with the American pilots because of his failure to reflect the October instruction** from the Executive Committee (Harkenrider **attended no American negotiating sessions after November 28**). The Alpa Executive Committee also declared that "continuation of negotiating sessions inconsistent with Alpa policy is already destructive and intolerable". On the same day (November 27) Ruby sent a telegram to Chairman Edwards asking that the American negotiations "be suspended", but no such suspension in fact took place; on the contrary, the negotiations continued until the initialing of the December 1 crew complement document was accomplished, and for a few days thereafter.

On the same date—November 27—the Alpa Executive Committee asked the American Negotiating Committee and Harkenrider to appear before them the following day. Harkenrider did appear and gave a complete report; O'Connell and the rest of the American Committee did not appear. The Alpa Executive Committee adopted resolu-

tions that the American negotiations "be recessed . . . until . . . there is complete understanding as to the direction of such negotiations and a resolution of the controversy on crew complement" and that "such understanding be in writing". Miller, the only American pilot on the Executive Committee of Alpa, was apparently not present; those voting were all on air lines other than American.

After sending copies of the resolutions to O'Connell, Ruby again met with him and the Negotiating Committee on December 5 and 6. Ruby was unable to get any satisfactory "understanding . . . in writing" from the Negotiating Committee.

Ruby also went with O'Connell on December 6 and had a discussion with Whitacre. It is not clear to what extent Ruby was told of the December 1 initialed document; certainly he was not given a copy of it. The pilot seems without such significance because in any event Ruby had full knowledge of the negotiating attitude of the American Committee, namely, that they would not insist on a "C and I" for flight engineers.

At the December 6 discussion with Whitacre, he and Ruby did agree (over the objections of O'Connell) that the negotiations would stand in recess—with the approval of Chairman Edwards—until some time in January.

12. *Final Split Within Alpa: the Company Decides to Continue Negotiations with the Committee of its own Pilots*

The American MEC met in Chicago on December 11, 12 and 13. Ruby was with them on several occasions; the old ground was covered; there was no change. It was agreed, however, that the American MEC would meet in joint session with the Alpa Executive Committee.

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Ruby then on December 19 called in the Master Chairman of the thirteen air lines flying jet planes, including O'Connell of American; Ruby asked if he had been correctly stating Alpa policy and he gave O'Connell an opportunity to explain the American Committee's views. Eleven of the Master Chairman declared that Alpa policy required as a minimum a "C and I" for all flight engineers; O'Connell and another dissented.

On January 5, 1963, the Negotiating Committee met with Whitacre on an unrelated matter (the "wet lease"); at that time O'Connell told Whitacre that the American MEC had directed that negotiations be resumed on the same basis as before the recess. Whitacre said the Company was not in a position to resume negotiations until more had been heard of the American Committee's status and until Whitacre could talk it over with Chairman Edwards.

The American MEC met in Chicago again from January 8 through 11, 1963, with some 22 members present. The MEC met separately, met with President Ruby, and met jointly with the Alpa Executive Committe. Ruby stated perfectly clearly the "mandatory policy" of Alpa to require a "C and I" for flight engineers and he reminded the American pilots that there had never been an agreement on any air line "which contemplated less than a commercial license and instrument rating for the third crew member on jet equipment".

The American pilots were equally clear and were "adamant". The American MEC at Chicago resolved unanimously and "speaking for the entire AA pilot group" to authorize the Negotiating Committee to conclude an agreement with American without requiring flight engineers to have a "C and I". The American MEC further authorized

the Committee to advise the Company that the pilots were "agreeable to implementation of said contract with or without formal approval of the Alpa". The American MEC declared that the pilot group had "no intention of giving up demands regarding reductions in flight time and duty formulae that have been successfully negotiated".

At this point, the split between the American MEC and the Alpa national organization became complete and it later proved to be final.

On January 11, Ruby notified the American Negotiating Committee that no negotiations could take place without "prior approval" of Ruby himself. He also gave notice that such "prior approval" was required before Alpa would reimburse the Negotiating Committee members — as had been the practice in the past — for their expenses and for loss by them of flight pay while acting as negotiators.

Under date of January 11, Ruby also notified the President of American that any negotiations with its pilots had to be "with the presence and consent" of Alpa and that further negotiations could only take place by "arrangement" with Ruby.

On January 11 at New York, O'Connell again asked Whitacre to resume negotiations with his committee. This time he told about the American MEC resolutions at Chicago and also said that any agreement reached would be submitted for ratification by 75% of American's pilots; he asserted confidently that this could be acquired easily.

Whitacre then on January 13 explained the situation to Chairman Edwards, who advised in substance that the Company had no choice but to resume negotiations with the American Committee, that it was the same committee as before and that there was no other committee with which

to negotiate. Testimony by Whitacre to this conversation was received over objection by plaintiffs and intervenors that it was not binding and was hearsay and further that Chairman Edwards could not, or would not, be called by them to testify because of a suggested privilege arising from NMB regulations. These objections are not believed to be well taken, but even had the testimony been excluded the conclusion would be the same. The record shows without contradiction that when, as will be seen, the Company did resume negotiations with the American pilot committee, Chairman Edwards or another NMB mediator (Scoonover at this period) was always present, or both together were present. This in itself shows an approval by the mediators of the course which the Company decided to follow; such an approval has no force as a matter of law but is significant in determining the Company's good faith.

On January 16, O'Connell, as Chairman of the American MEC, sent a letter to the President of American containing the text of the American MEC Chicago resolutions and repeating in substance what had earlier been told to Whitacre about resuming negotiations.

On January 16, 1963, negotiations were in fact resumed between the Company and the pilot's negotiating Committee; the composition of the committee was the same, except that Miller was away on a trip to Africa; neither Hark Herider (who had not been a member of the committee) nor any other Alpa employee was present.

On January 17, 1963, the engineers negotiating committee joined the negotiating group.

It was therefore the Company's decision, on or about January 16, 1963, to negotiate with the American pilot's committee despite the opposition and warnings of Alpa. The Company refused to bargain with the Alpa national

organization; it decided to bargain with the negotiating committee of its pilots, which committee had been chosen under Alpa auspices and procedures.

13. *American had Reasonable Grounds to Believe That the Negotiating Committee Represented a Majority of the "Craft or Class" of its Pilot Employees and Acted in Good Faith in Continuing to Deal with That Committee so far as Pilots are Concerned*

Whether the Company acted in good faith in continuing to bargain with the Negotiating Committee appears to be an issue of fact. Consideration of all the evidence, including that contained in the foregoing recital, leads to a conclusion that in an unhappy situation the Company did act in good faith and without any improper influence, coercion or assistance with respect to any of its pilot employees.

The question before the Company under the Act was: who was the "representative" of the "craft or class" of American pilots, the American Negotiating Committee or the Alpa Home Office?

The credentials of the American Negotiating Committee were far more impressive in this respect than those of the Alpa Home Office.

The Negotiating Committee had been selected by the American MEC and in effect the Company was dealing with the American MEC itself, since the Committee reported to and received instructions from the MEC and the Master Chairman was a member ex-officio of the Committee. The American MEC was made up of the *only* representatives *elected* by American pilots; during the dispute with the Home Office, elections of such representatives by

American pilots continued to take place at six months intervals, one-third being elected each six months, the most recently elected representatives taking office on October 1, 1962, and April 1, 1963. The MEC, according to Alpa policy, is "the highest governing body" for the pilots on an air line; likewise, elected representatives must represent "their constituents", according to Alpa policy and failure to do so is said to be against the interests of Alpa itself. The American MEC supported, approved and ratified all that its Negotiating Committee did.

The Alpa Home Office and its several members who had discussions with the Company — Ruby, McMurray and Christie—were not employees of American and had not been elected by American pilots. In fact, the decisions made by the Alpa national organization were made by pilots from air lines *other* than American. This is to be considered in the context that under the Act representatives of employees in the air line industry have been selected on an individual carrier basis and negotiations conducted on an individual carrier basis; this is, moreover, a part of Alpa policy which specifies that negotiations must be carried on "individually with each carrier".

The Committee with which the Company elected in January 1963 to continue to deal was exactly the same committee with which it had been dealing all along—a committee which, so far as American could tell, had the confidence and approval of the Alpa Home Office until January 1963.

It was not the Company which caused the split between the Committee and the Alpa Home Office. The proposal to require of flight engineers less than a "C and I"—over which the split occurred—was not made by the Company but by the Negotiating Committee of the pilots, and at a

time when this Committee was officially representing Alpa and with an Alpa staff negotiator in attendance.

Nor did Alpa ever present the Company with any feasible alternative to continuing to deal with the old Committee. No new or substitute committee was ever presented to the Company by Alpa, and both uniform past practices as well as Alpa policy required that negotiations be conducted for the American employees by a committee from such employees. The outside national officers and staff members of Alpa were never authorized to carry on negotiations for American pilots, and they never undertook in this instance to do so.

Under the circumstances, it seems impossible for Alpa to have produced a proper Negotiating Committee, other than that already in existence. The Alpa Policy Manual makes it clear that

> "The MEC shall appoint or elect the members of the Contract Negotiating Committee."

The American MEC had in fact appointed the Committee with which the Company dealt and, supporting that Committee fully, was not likely to appoint another, either at the request of the Alpa Home Office or otherwise.

All past contracts had been negotiated by the Company with just such a Committe, and no President of Alpa had ever refused to sign a contract so negotiated. Indeed, a minor agreement—respecting the "wet lease" by American to British West Indian Airways—was negotiated with this very Committee as late as January 1963 and signed for Alpa by President Ruby.

The Company never suggested that its pilots leave Alpa, and certainly never made it any condition of its promises.

that a separation take place. The Company was ready at all times to sign an agreement with Alpa, but the Alpa Home Office would not sign the agreement as negotiated with the Committee representing American pilots. There may have been good reasons for the attitude of the Alpa Home Office, but with these or the merits of the dispute otherwise this Court can have no concern. To give the Alpa national organization, controlled by employees of other air lines, a veto power over contracts negotiated by the American pilots who must work under the contracts is not consistent with democratic procedure on the American air line system itself.

This is especially true when it is considered that Alpa, as a bargaining representative, is an agent only; it is the American pilots themselves who are the principals. The execution of past agreements bears witness to this; they are signed by the President of Alpa "for the air line pilots in the service of American Airlines, Inc." The elected American MEC is much closer to the pilot principals than the Alpa Home Office and national organization.

Moreover, it was represented to the Company by the Committee that discussions at the Local Council level had shown a unanimous support for the Committee which could "very easily guarantee" at least a 75% approval by the pilots of any contract negotiated. There seems to have been no reason whatever for the Company to doubt this.

The Company, without any certification or election or other form of choosing by its pilots, had for a long period recognized Alpa as bargaining representative. There seems nothing to prevent the Company in good faith from withdrawing each recognition on the basis of new and convincing evidence.

Finally, the actions of Chairman Edwards and his NMB associates must be taken into account. These could not make legal what was illegal, but on the issue of good faith in a difficult situation they are not without significance and add to the impression that the Company acted properly in its dealings with the pilots.

14. *Further Steps by Alpa; Commencement of This Action*

It may be convenient at this point to refer to the next steps of Alpa before the institution of this action.

Under date of January 18, Ruby sent telegrams to Chairman Edwards and to the Company declaring that the American pilot's committee had no authority to speak for, or to conclude any agreement for, American pilots and that the resumed negotiations were in violation of the Act. On the same day Ruby wrote to the Company (copy to Chairman Edwards) drawing attention to a provision in Alpa's constitution and by-laws requiring approval of the Executive Committee of Alpa or of its president before negotiations can be initiated or agreements executed.

The Company's reply to Ruby (dated January 18) included a statement that Chairman Edwards was present at the resumed negotiations and "advises" that the parties should continue to bargain".

Under date of January 24, Ruby then sent three letters: (a) to the Company, again warning that dealing with the pilot's committee was unauthorized and illegal, and asking for a meeting on January 30 "to negotiate an agreement between the Association (Alpa) and your Company"; (b) to O'Connell calling upon him and the committee "to desist immediately" from the resumed negotiations; and (c) to President Manning of the Chapter, giving him copies of the

earlier correspondence, and declaring the resumed negotiations "not authorized" by and not "binding" on Alpa.

The reply of Manning to Ruby (dated January 28) stated that the Alpa split "certainly ends our consideration of merger between the two organizations (i.e., Alpa and the Chapter) for the time being." It referred with some bitterness to Alpa's "failure to intervene" at Eastern Airlines, where pilots eventually took over the jobs of the flight engineers. It warned that for Alpa to "press" its disagreement with the American pilots might lead to a strike or to lengthy litigation, either of which would be "unfortunate", and it suggested a request for help to the Secretary of Labor and to Chairman Edwards.

The reply of the Company to Ruby (dated January 28) expressed a willingness to "confer generally" on January 30 but in effect refused to negotiate with Ruby—"a separate and duplicating negotiating session". The reply also stated that whether Alpa became a party to any agreement negotiated by the American pilots was "an internal matter" for Alpa.

A meeting between Ruby and the Company did take place on January 30, but (as might have been expected) it solved nothing. Apparently Ruby tried to get a negotiation started between American and the Alpa Home Office, but he was not successful. The Company asked how another committee of American pilots could be designated; according to all past Alpa practice, negotiations were conducted by a committee of pilots employed by the particular air line and appointed by the MEC, and such a committee was already in existence. Ruby evidently had no solution for

this problem; he contemplated "bringing the existing committee in or whatever arrangement was necessary". The fact is that no substitute or other committee was ever appointed or arranged for by Alpa.

Ruby next instructed Christie, Director of Agreements for Alpa (a staff member), to present himself to American as "the duly appointed Representative". The efforts of Christie were not successful. He went to New York but apparently did not attempt to enter the negotiating sessions. At the suggestion of Chairman Edwards, American officials talked to Christie (with mediator Schoonover present) but nothing came of it.

The Executive Board (as distinguished from the Executive Committee) of Alpa met at Chicago on February 5, 6 and 7. There were about 86 persons in attendance, including O'Connell; also present were other members of the American pilot's committee and of the American MEC. The Executive Board adopted resolutions (a) endorsing Ruby and his interpretation of Alpa policy; (b) declaring that the American MEC and Negotiating Committee "are not the bargaining representative of the American pilots"; (c) directing Ruby or his representatives to negotiate and conclude an agreement with American; and (d) finding the acts of the American MEC and Negotiating Committee "not in the best interests of Alpa".

Under date of February 8, Ruby sent copies of the resolution to the Company, to O'Connell, and to the American MEC.

The Company's reply again stated that it had "no choice but to go ahead" (that is, to continue negotiating with the committee of American pilots), again referred to the advice of Chairman Edwards that it do so, and ex-

pressed an inability to see any "way in which separate negotiations can be started".

On February 16, Ruby (accompanied by Alpa counsel) discussed the situation in New York with Company officials. The letter stated that the Company had wanted an agreement with Alpa, was sorry to be in the middle of such a problem, but as between Alpa and the Company's own pilots felt obliged to deal with its pilots.

On February 19, Ruby authorized McMurray and Christie (two staff members of Alpa) to try to start "proper negotiations" with American.

On February 21, McMurray and Christie appeared at a negotiating session in New York. Garvey (a member of the pilot's committee) asked Christie to leave. He and McMurray both left and shortly afterwards McMurray returned with Chairman Edwards and Whitacre. McMurray remained in the session for a while and then left, but before leaving stated that the pilot group did not represent Alpa and that the negotiations were illegal, to which Chairman Edwards took exception.

There were no further contacts by the Alpa national organization with any of the parties and this action was commenced by Alpa on March 1, 1963.

15. *Resumption of Joint Pilots-Engineers Negotiations with the Company, the Substitute Pages, Joint Negotiations Ended by Engineers*

After the Company had decided to bargain with the pilot's Negotiating Committee rather than with the Alpa Home Office, meetings began on January 17, 1963, between the Company and the two committees, one for pilots and one for engineers.

The assumption in those negotiations was that the two unions—one for pilots and one for engineers—would be merged into one union in the cockpit and that one agreement (that being negotiated) would cover both pilots and engineers.

Until a merger agreement between the two unions had been made, there necessarily was separate bargaining representation for pilots and for flight enginers. While the negotiating sessions were at time joint and while O'Connell at times acted as chief spokesman for the two committees, it was understood between them that the flight engineers would negotiate thir own wages and that their separate representation had not been given up. This was an entirely natural arrangement, not only because at that stage the engineers did not want to put themselves entirely in the hands of the pilots, but also because the pilots themselves hesitated to assume such a responsibility.

Thus as between pilots and engineers, there was no question but that the Chapter continued to be the representative of the engineers. The pilots did not purport to act for the engineers. As O'Connell testifed: "We considered ourselves the pilot committee". The pilots never used the expressions "joint committee" or "joint negotiating committee". Especially considering the tentative and dependent character of the arrangements being worked out, there was no reason for the Company to suppose that in advance of complete agreement the flight engineers had given up their separate representation.

a. The Substiute Pages

During the resumed meetings in January 1963, it became apparent to the pilots and to the Company that execution by Alpa of the agreements being negotiated was highly

doubtful, to say the least. The letters from Ruby of January 11 and 18 and his telegram of January 18 gave added confirmation.

The December 1, 1962 "memorandum of agreement" covering crew complement had been drawn up for execution by Alpa (for the pilots, and contained a provision by which the engineers would give up their bargaining representation to Alpa. Feeling that Alpa participation was now not to be expected, the Company prepared new and substitute pages for those pages of the December 1, 1962 crew complement agreement on which the name of Alpa had appeared. This involved a change in the provision for the future merged union of pilots and flight engineers (because it had been assumed that the merger would be with Alpa) and thus for the future bargaining representative of the engineers. The new language proposed by the Company took account of the fact that it was not then known how the place of Alpa would be filled—what the organization would be. The new language in the substiute pages was that the engineers and pilots should be "consolidated into one craft or class unit", that the engineers agree that "their collective bargaining representative hereafter shall be the same as that which now or in the future is recognized by the Company as representing a majority of its cockpit crew members", and that the Chapter gives up its representation rights to "said cockpit crew representative".

These substitute pages were given by O'Connell to the engineers on January 24, were objected to strongly by the engineers, and were the subject of heated controversy with the Company until February 20. The position of the engineers was that under the substitute pages they were asked to give up their representation rights to whatever group the American pilots (or their then committee) de-

cided, that this was an "unknown", and that before they would give up their representation rights they wanted to know with what organization they were dealing and also (importantly) the terms of their merger into such organization.

The Company asked Chairman Edwards for a letter approving the substitute pages but he felt unable to comply. Efforts through language revisions to overcome the objections of the engineers were not successful. On February 20, the Company withdrew the substitute pages and stated that it would stand on the December 1, 1962 wording of the crew complement agreement. This left the situation far from clear, because the December 1 wording was designed for execution by Alpa and if Alpa did not execute the document, it would be in major respects frustrated.

b. Dispute Over Representation of Engineers and end of Joint Meetings

Meanwhile a further controversy arose between the Company and the engineers. On January 31, the negotiations reached the subject of pay and retirement provisions for the engineers.

The basis of these negotiations was that one agreement would cover both pilots and engineers, who would belong to one union; indeed, the engineers were included under the term "pilots" in the draft agreements then being discussed. The bringing of the pilots and engineers into a single representation was one of the advantages to the Company for which it was bargaining and making concessions.

The Company took the position that on and after November 1 the pilots and engineers were *already* one and that the engineers for collective bargaining purposes were

being represented by a "Joint Negotiating Committee", of which O'Connell was chairman or spokesman. Accordingly, the Company position on January 31 was that pay and retirement provisions for engineers were matters for negotiation with the "Joint Negotiating Committee" and not with the engineers' committee separately; the Company declined to negotiate with the engineers' committee separately.

The engineers vigorously contested the Company's position and both verbally and in writing asserted the continuing representation by the Chapter of the engineers as "a separate bargaining unit under the Railway Labor Act."

If there had been no dispute within Alpa itself, probably the engineers and the Company could eventually have found a compromise. But the difficulty was that Alpa and the American pilots had split, and in these circumstances the engineers were unwilling to give up their representation to the "unknown". The Company insisted without justification that they had *already* given up their representation to the "Joint Negotiating Committee".

Doubtless the attitude of the Company was influenced by a feeling that it was unfair for the engineers to demand separate representation while at the same time demanding, or expecting, the benefits promised by the Company in exchange for single representation of pilots and engineers.

Be that as it may, the fact is that the engineers had clearly not given up their separate representation, either to the "joint Negotiating Committee" or otherwise. There is no evidence that the Chapter ever gave up its representation of the engineers; to the contrary, the evidence is that until a merger with the pilots had been brought about, the Chapter was to continue as before. That O'Connell or

other members of the pilots' committee were requested, or permitted, to speak or to make proposals for the engineers was a matter of procedure, not of substance, and did not amounts to any relinquishment or transfer of the Chapter's rights.

The joint sessions continued until February 21—the day after the withdrawal of the substitute pages—but the unresolved conflict between the position of the engineers and that of the Company finally resulted in refusal by the engineers to accept the demand of the Company for "joint committee" bargaining only; the engineers attended no joint sessions after February 21.

c. Events leading up to Intervention by Engineers in This Action

On February 26, the Master Executive Council of the American engineers had a meeting in Los Angeles. Whitacre and O'Connell were invited, and they addressed the meeting on separate occasions. Among other things, Whitacre indicated that the Company would continue its negotiations with the pilot committee until agreement was reached; that he had a lingering hope of acceptance by Alpa of such an agreement, even without the "C and I"; that if not and if the American pilots left Alpa and formed a separate organization with the engineers, they would be better off and Alpa would later ask them to come back; and that he felt the Company had an agreement with the engineers on many important points, but was not "holding anybody to it". O'Connell said he hoped the engineers would accept the agreement negotiated by his Committee.

At this meeting in Los Angeles on February 26, the engineers' MEC resolved to ask the help of top officials of the AFL-CIO to resolve the several intra and inter union dis-

putes. These officials made an effort, but there was no success.

Chairman Edwards then attempted to bring the engineers and the Company together again; meetings were held with him by the Company and the engineers on March 6, 8 and 12. The Company would not call these meetings "negotiations" because it maintained the position that it would negotiate with the flight engineers only through the "Joint Negotiating Committee"; the Company called these March meetings "bull sessions" and although many ideas were exchanged, nothing was settled.

Under the May 1, 1958 agreement between American and the Chapter, notice of intended change under Section 6 of the Act could be given as to any provisions of the agreement (whether related to compensation or not) at least 60 days before its expiration on April 30, 1963. Under date of February 28, 1963, the Chapter gave notice to the Company of a desire to change numerous sections of the May 1, 1958 agreement, including Sections 5 and 6 as to compensation and as to which notices of intended change had already been served by the Company and by the Chapter in February 1961. The Chapter suggested that a meeting to negotiate could "take place at any convenient time satisfactory to the Company".

Under the same date of February 28, 1963, the Company gave notice to President Manning under Section 6 of the Act of its intended changes in "existing agreements". The Company referred, however, to "current negotiations with the Joint Commitee of pilot and flight engineer representatives" and suggested that bargaining "continue under the auspices of the Joint Committee and Mr. Leverett Edwards".

The Chapter, under date of March 7, 1963, notified the Company that it would not bargain through any "Joint Negotiating Committee", that there had been no transfer or release of its rights as bargaining representative of the engineers, and that agreements as to the engineers were therefore required to be negotiated with it; the Chapter stated that it was prepared to meet with the Company "immediately".

There was no response by the Company, which apparently maintained its position of bargaining with the flight engineers only through the "Joint Negotiating Committee".

The Chapter and its president then moved for leave to intervene and serve a complaint in this action. The motion was granted on consent on March 19, 1963.

March 22, 1963, the Chapter notified NMB that it would agree to arbitrate all issues in dispute with American. On March 28, 1963, American notified NMB that it would not arbitrate, because the Chapter's agreement to arbitrate came too late (after its June 19, 1962 refusal) and that intervening events had made arbitration "inappropriate".

16. *The Company and Pilots Reach Agreement on March 15*

Despite the withdrawal of the engineers from the joint sessions, the Company and the pilots' committee continued their negotiations for an overall agreement (or group of related agreements), including provisions affecting the engineers.

During these negotiations and on March 5 and 6, O'Connell reviewed the situation with seven former American MEC chairmen (going back to 1941 or 1942) and with

Chairman Edwards. The former MEC chairmen gave O'Connell a written statement approving his efforts to secure a new agreement with the Company and declaring that "nothing should be allowed to delay or interfere with the implementation of this Agreement".

On March 15, the negotiations were concluded and all agreements were then in form satisfactory to the Company and to the pilots' committee (these agreements will be sometimes referred to for convenience as the "March 15" agreements).

There was a so-called "basic working agreement" and related supplementary agreements, including that covering the crew complement question. The March 15 basic working agreement covered both pilots and engineers, as to compensation and everything else; the engineers are called "Flight Officers" and are also included in the term "pilot"; this agreement was designed to be executed by one bargaining representative for all "pilots", including engineers. The March 15 crew complement agreement is the same as that initialed on December 1, 1962; it contains the name of Alpa in all appropriate places; it was designed to be executed by Alpa, by the Chapter, and by the Company. With the positions of the parties as they were on March 15, it was of course impossible to carry out the scheme contemplated by the March 15 agreements because Alpa had already commenced this action and could not consistently execute the agreements.

Copies of the March 15 agreements arrived at with the pilots were, at their request, provided to them by the Company; likewise the Company on occasions furnished rooms for negotiation sessions, secretarial help, coffee, etc. In volume this appears to have been de minimis and in any event it did not differ from what had been the practice in all past negotiations.

After Alpa and the American pilots had split apart, O'Connell (Master Chairman of American MEC and ex-officio a member of the Negotiating Committee) discussed with Lamond (Vice-President of American for flight) whether the pilot members of the committee could later be reimbursed by the Company for flight pay lost during the negotiations. This came about because such lost flight pay had in the past been paid to the pilots by Alpa itself, but this was no longer to be expected and on January 24, 1963 Ruby notified the American pilots that no further payments would be made. When the subject was raised by O'Connell, the most Lamond would promise was to "consider" it in the future if it were "legal" under the Act. There was no promise of any such payment; there is no evidence that any such payments have been made; and there is nothing in the incident which could possibly amount to unlawful assistance.

17. *Formation of Allied Pilots Association; its Application to NMB*

On March 19 through 22, the American MEC met in New York. The March 15 agreements were unanimously ratified. Ruby was invited to some of the sessions; he did attend and spoke to the group. Among other things, Ruby said that Alpa would not recognize any agreement negotiated by the pilots' committee and that he, as Alpa President, would not sign any such agreement if it did not contain a requirement of a "C and I" for flight engineers.

Anticipating that President Ruby would not sign the March 15 agreements, the MEC authorized the formation of a new organization—Allied Pilots Association—to take over representation of American pilots. O'Connell was named temporary president, other temporary officers were

named and the members of the MEC (that is, the elected captain and co-pilot representatives of each Local Council on American) became the acting directors of the new organization.

There is no evidence that the Company suggested, encouraged or even knew in advance about the determination of the American pilots to leave Alpa over the "C and I" issue and form their own organization.

Under date of March 23, Whitacre wrote to O'Connell confirming certain understandings as to the rates of pay and retirement benefits for engineers and adding that as to retroactive pay for engineers the Company "stands ready to meet with the Joint Committee"; apparently neither this letter nor the March 15 agreements were given to any of the engineer representatives.

The American MEC at its March 19-22 meetings had instructed O'Connell to make one last effort to have the March 15 agreements executed by President Ruby for Alpa. O'Connell obtained from the Company copies of the March 15 agreements with the name of Alpa in all appropriate places and on the morning of March 29 asked President Ruby to execute them. Ruby asked that the agreements be left with him for study; O'Connell refused. Ruby did not sign.

On April 12, Allied sent out to all American pilots cards which if executed would authorize Allied to be the collective bargaining representative under the Act of the pilot so executing and on his behalf to ask for certification under Section 2 Ninth of the Act (45 U.S.C.A. § 152 Ninth).

On April 24, Allied filed with NMB an application, stating that a "representation dispute" had arisen among American pilots as to their representative under the Act and asking for an investigation and certification under Sec-

tion 2, Ninth, of the Act. The "craft or class of employees involved" was said by Allied to be "pilots and co-pilots"; the total number of these was said to be 1600; and the total authorization cards submitted by Allied was said to be 1150.

At this point, the taking of evidence on these motions had been going on for some time, and at the opening of Court on April 25 an affidavit of O'Connell was submitted, setting forth the developments as to Allied and its application to NMB. Counsel for the additional defendants moved, or strongly suggested, that the motions of plaintiffs and intervenors were moot, but their counsel opposed. Argument on this point was heard, the proceedings temporarily adjourned, and the following day a memorandum decision was filed directing that the hearings resume on April 30 and proceed to completion.

On April 26, O'Connell and all other members of the American Negotiating Committee (except Miller, who had resigned February 18, 1963 were expelled from Alpa. The grounds for expulsion do not appear in this record but since there were pleas of guilty by the American pilots, it may be surmised that expulsion was for "failing to comply with a decision of . . . the Executive Board, the Executive Committee . . .", etc.

18. *Recognition of Allied by the Company; Second Suggestion of Mootness*

The hearings did resume on April 30 and were completed and the record closed on May 3. Final briefs were received on May 27.

Apparently Alpa requested NMB to defer passing on the certification application of Allied until decision of the

pending motions in this action. On May 24, NMB denied this request.

On June 12, the NMB mediator reported that 1571 pilots and co-pilots of American were eligible to vote for a collective bargaining representative and that Allied had been given authorization by 1334 of these, or in excess of 84%.

NMB then ordered an election to be held among American pilots and co-pilots to decide whether Alpa or Allied would represent the pilots. No such election has taken place, however, because of an action commenced by Alpa against NMB in the District of Columbia and because of orders made by the Court therein.

On June 19 and July 3, Allied demanded of the Company recognition as collective bargaining representative of all American pilots and co-pilots.

On July 9, the Company recognized Allied as such representative and on the same day signed certain collective bargaining agreements with Allied, effective July 9, 1963.

On July 11, an affidavit of Whitacre was filed in this action, setting forth the most recent developments above mentioned and supporting a suggestion, filed on the same date by counsel for the company, that the motions are now moot.

The suggestions of mootness by the Company as to the pending motions is based on (1) the recognition by the Company on July 9, 1963 of Allied as collective bargaining representative of the pilots, (2) the execution of collective bargaining agreements between Allied and the Company covering pilots and (3) the sending of a letter by the Company on July 11, 1963 to President Manning stating that the Company is "now prepared to resume bargaining" with the Chapter.

Copies of the July 9 agreements have been submitted by the Company. They differ significantly from the March 15 agreements because they do not cover, or purport to cover, or to affect in any way, the flight engineers; the December 1, 1962 crew complement agreement has not been executed.

I.

It must first be determined whether, as urged by defendant and additional defendants, the present motions are now moot. Plaintiffs and intervenors insist that they are not.

As to the issues raised by Alpa, the Company says that any status which Alpa may have had at one time is now lost through the July 9 recognition of Allied; that Allied is not a party to this action; and that the execution of the new agreements is outside the scope of this action.

These may be arguments against the issuance of an injunction but they certainly do not show that all controversy has been eliminated and the motions become moot. The arguments do not really raise any issue of law as to mootness, because they do not meet the charges and grievances asserted by plaintiffs.

The organization of Allied, its recognition by the Company, and the execution of a collective bargaining agreement between Allied and the Company are not acts separate and independent from those on which plaintiffs base their claims. On the contrary, they follow from and are intimately related to the facts developed on these motions.

What Alpa argues is that there were violations of the Act and that the effects of these violations are continuing. Indeed, the Alpa argument is that the new facts on which the Company relies are themselves the result of the alleged illegal acts and that this Court has a duty under the

Act to see that defendant does not enjoy these benefits of the alleged unlawful acts.

In the face of such arguments, it seems entirely clear that the motions of Alpa are not moot and must be decided on their merits.

But even if the matter were regarded as doubtful, it would seem the better course to decide the issues tendered by plaintiffs rather than to declare them moot. On any appeal, the matter would then be fully before a higher court rather than in fragments.

The intervenor flight engineers are in a different factual situation from Alpa. As to the engineers, the Company now declares (under date of July 11, 1963) that "[b]ecause of these developments" (namely, the execution of agreements with Allied, etc.), it is "now prepared to resume bargaining with AAL Chapter, FEIA." The Company further declares that, at its request, Allied "has given us assurances for the protection of flight engineers".

The Company says that the intervenors sought a Court order directing it to bargain with the Chapter; that it is ready to do so and has declared its readiness to the Chapter in writing; and that accordingly no Court order is needed and the motions of intervenors are moot.

The problem frequently arises whether an injunction should issue where the acts complained of have been discontinued during the litigation. See Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L. Rev. 125, 137-146 (1946).

It is well settled that "the Court's power to grant injunctive relief survives discontinuance of the illegal conduct." *U.S. v. W. T. Grant Co.*, 145 U.S. 625, 632 (1953). As explained by the Supreme Court in the *Grant* case, this is because

> "A controversy may remain to be settled in such circumstances. . . . e.g., a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement."

The burden on a defendant asserting mootness by discontinuance of illegal acts is "a heavy one" (345 U.S. at 633). And in the *Grant* case, where refusal of an injunction was upheld as an exercise of discretion, the Supreme Court nevertheless concluded that "the actions were not moot" (345 U.S. at 635).

In the case at bar, the circumstances strongly suggest that the motions of intervenors should be decided on their merits. If it be assumed—as it must be for present purposes—that the engineers have established violations of the Act, then it would seem that they ought to receive a protective injunction even though the Company's attitude may have changed. No bad faith on the part of the Company need be even suggested in this connection. Its present attitude is accepted as genuine and sincere. But that attitude can change; and of course the individuals determining the Company's attitude themselves change as retirements, promotions and replacements occur. Moreover, there is no admission or recognition by the Company that its attitude toward the engineers has been wrongful. This is a factor also to be considered. *U.S. v. Aluminum Co.*,

142 F. 2d 415, 449 (2d Cir. 1945). The Company's changed attitude is not the result of a recognition of its duties as claimed by the engineers; rather the change is based on the recognition of Allied and its "assurances" respecting the engineers. If it be assumed that the engineers' claims on those motions are well founded, they should not be required to rely solely on "assurances" by Allied and on the dependent changed attitude of the Company.

And if the matter be doubtful, the same considerations as to a possible appeal are here present, as in the case of Alpa.

The suggestion that the motions are moot is therefore rejected.

II

Once the facts have been analyzed and considered chronologically, the disposition of Alpa's motions is not difficult.

These motions ask in substance that a preliminary injunction issues directing the Company to bargain with Alpa as the "true representative" (300 U.S. at 548) of its pilot employees and restraining any bargaining as to pilots with any other group.

Whatever may have been the situation when the motions were made, since April 24, 1963, a proceeding has been pending before NMB to determine whether Alpa or Allied is the "true representative" of the pilots and NMB has ordered an election, on the basis of which NMB will certify the "true representative".

But whether NMB proceedings are pending or not, this Court is without power to find that Alpa is the "true representative" and entitled to the relief sought. The "administrative remedy" before NMB is "exclusive". *General Committee* v. *M-K-T Ry Co.*, 320 U.S. 323, 336 (1943).

This principle has been recently recognized and followed in this Circuit where the dispute was over the "true representative" of flight engineers on an air line. *Flight Engineers Inter. Ass'n.* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (1963).

In the two cases cited, no proceedings to determine the "true representative" were in fact pending before NMB but it was held that Congress had "excluded" the Courts from this "field" (311 F.2d at 748).

In an interesting recent case having some parallel aspects, a railroad bargained with the national parent union and made an agreement. One of the local unions (part of the national organization) challenged the agreement as violative of the Act, asserting that the local was the "true representative" rather than the parent national union. The Courts were held to be without jurisdiction of the matter. *Division No. 14 Order of Railroad Tel.* v. *Leichty*, 298 F.2d 17 (4th Cir. 1962). It was said that such disputes ought to be resolved within the union but that "if these intra-organizational efforts are challenged, Board action [i.e., NMB], not judicial intervention is indicated" (398 F.2d at 21).

The argument for Alpa is that there are issues here beyond the identity of the representatives; that there has been influence and coercion by the Company in the choice by pilots of ther representative, in violation of the Act, especially Section 2, Third and Fourth (45 U. S. C. A. § 152, Third and Fourth); that the Company assisted in the formation of Allied; in violation of Section 2, Fourth of the Act (45 U. S. C. A. § 152, Fourth); that the effects of these violations continue; and that the company should be prevented by this Court from securing any benefit from the alleged violations. The logical consequence of such an argument is that the Court should disqualify Allied

as a possible representative, even though it might have the support of a majority of the pilots. The Court, according to Alpa, has such jurisdiction "independent of the National Mediation Board".

Apparently Alpa would agree that NMB has exclusive jurisdiction where the issues is simply to decide which of two rivals has majority support. But where violations of the Act—influence, coercion, assistance—are alleged, Alpa argues that this Court has an independent jurisdiction. At least under the conditions here present, I cannot agree.

The existence and effect of unlawful influence, coercion and assistance seem inseparable from all other matters to be determined by NMB under Section 2, Ninth of the Act. After all, what Alpa is saying in effect is that because of influence, coercion and assistance by the Company, Allied (even though it might have majority support) cannot replace Alpa as the "true representative". This is the very question which Congress has committed to NMB, and not to the Courts.

Counsel for Alpa concede that where NMB acts under Section 2, Ninth, in a representation dispute, it deals with charges of unlawful interference, coercion and assistance. There is authority that the jurisdiction of NMB in these particular matters is exclusive. *WES Chapter, Flight Eng. Int. Assn.* v. *National Mediation Bd.*, 314 F. 2d 234 (D. C. Cir. 1962). An election was held by NMB to determine whether WES Chapter or SOA was the "true representative" of flight engineers; NMB certified SOA. An action was then commenced by WES Chapter to vacate the election and for injunctive relief. It was claimed (a) that eligible engineers had been excluded from voting and (b) that NMB had not investigated fully "the charge that

SOA was dominated and assisted by the employer" (314 F. 2d at 335). It was held that the Courts could not assume jurisdiction of such questions; as to domination and assistance it was said (314 F. 2d at 237):

"The Association charged that SOA was assisted and dominated by the employer in violation of section 2, Third and Fourth, of the Act. The Board held a hearing on these charges, taking pertinent testimony but declining, because of lack of power, to compel attendance of certain witnesses requested by the Association. The statute, in Section 2, Ninth requires an 'investigation' of such disputes; and the Board, it seems to us, did investigate. In a different case, where for example, a stronger showing is made initially by the charging party than was made here, the Board might be required to make a more independent investigation into a charge of company assistance to an opposing union seeking certification. But in discharging its duty to investigate in the manner it did in this case we find no official conduct in excess of authority and no refusal to bring the processes of the Board to bear in a reasonable manner on the dispute. Accordingly we do not think the District Court acquired jurisdiction to upset the Board's ruling that the Association's charges were without merit." See also *Order of Ry. Conductors* v. *National Mediation Board*, 141 F. 2d 366 (D. C. Cir. 1944).

The findings of fact already made would preclude granting the motions of Alpa in any event. There is no showing or influence or coercion on the part of the Company nor any unlawful assistance by the Company in the break away from Alpa and in the organization of Allied.

The Company had nothing to do with the creation of *the dispute within Alpa, nor is there any evidence of any* preference by the Company not to have Alpa. The single

remark attributed to Whitacre in February 1963 does not affect this conclusion; it was insignificant in character and was not addressed to any pilots who might be affected thereby, but to flight engineers.

The fact that the Company continued to deal with the Negotiating Committee was not in my view any violation of the Act, considering that the Company acted in good faith, reasonably, without any practical alternative, and without any anti-union motivation.

Nothing in the two cases on which Alpa chiefly relies is to the contrary.

In *Virginian Ry.* v. *Federation*, 300 U.S. 515 (1937), there was no question about who was the "true representative" of the employees. There had been an election and a certification by NMB (there has never been any certification of Alpa). The question was whether there was a "legally enforcible obligation" (300 U.S. at 541) under the Act to bargain with the "true representative"; the petitioner railroad also argued the unconstitutionality of the Act.

In *Medo Corp.* v. *Labor Board*, 321 U.S. 678 (1944), the jurisdiction of the Court was not in doubt; the proceeding was on petition of the National Labor Relations Board to enforce its order requiring Medo to bargain with the union, etc. (29 U. S. C. A. § 160(a)). Moreover, the employer had induced the employees to leave the union by giving them a wage increase; here American displayed no interest in whether its employees left Alpa or not, certainly made no promises conditioned on their leaving Alpa or to induce them to leave Alpa, and at all times was willing to make agreements with Alpa if its own employees so desired. Also in the *Medo* case, the employer ceased and refused to deal with the union and instead dealt *directly* with the employees; here American continued to deal at all times with

the same *representatives* of the employees, namely, the Negotiating Committee and the American MEC which finally caused the organization of Allied.

For the reasons set forth, the motions of Alpa must be denied.

III

The application of *Virginian Ry.* v. *Federation*, above, to the facts as found requires that the Chapter, representing American flight engineers, be given relief by way of a temporary injunction.

There is no doubt whatever that the Chapter is now, and at all relevant times has been, the "true representative" under the Act of the "craft or class" of flight engineer employees of American. It was so certified by NMB on May 25, 1955. There has since that time never been the slightest evidence from which the Company could conclude that the Chapter no longer represented such employees. No one else now claims, or has ever claimed, to represent the flight engineers.

From at least as early as January 31, 1963 to July 11, 1963 the Company refused to bargain collectively with the Chapter, and until at least as late as March 15, 1963 the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers.

The situation seems to be exactly the same as in the *Virginian Ry.* case and in many later cases where the "command" of Congress expressed in the Act must "be enforced by the Courts" (300 U.S. at 545). The arguments by defendant and the additional defendants that the Norris-LaGuardia Act (29 U. S. C. A. § 101 and following) is ap-

plicable and prevents an injunction are without merit. They were rejected in the *Virginian Ry.* case where the Supreme Court declared that the provisions of the Railway Labor Act authorizing relief by injunction "cannot be rendered augatory by the earlier and more general provisions of the Norris-LaGuardia Act" (300 U.S. at 563). See also *Brotherhood of Railroad Trainmen* v. *Chicago River and I. R. Co.*, 353 U.S. 30 (1957); *Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330 (1960).

Whether mentioned specifically herein or not, the Court has given careful consideration to all arguments of the Company in opposition to the motions of intervenors.

The principal contention of defendant is that the Chapter is "estopped" because of its participation in joint negotiations and because of statements said to have been made by counsel and by President Manning on November 1, 1962, that the flight engineers were merged with the pilots and that there was a single craft or class. The difficulty is that the facts do not support such contention. The representations as claimed were never made by the engineers and, if they had been, the Company could not reasonably have relied on them; indeed, the Company did not rely on them. The situation was perfectly clear. From November 1, 1962 the parties were hopefully negotiating for a complete agreement" was reached, there was no merger of pilots and engineers on American into a single craft or class; as Whitacre testified, the negotiations were "subject to a complete agreement". Plainly, until that "complete agreement" was reached ,there was no merger of pilots and engineers and no single craft or class.

The Company also urges that it made "substantial concessions" because of the conduct of the engineers and that the engineers have not lived up to "prior commitments".

But these contentions do not square with the facts. The engineers have received no "concessions", substantial or otherwise. The Company like the other parties—is bound to nothing which it promised or settled or discussed in the negotiations, this because everything was "subject to a complete agreement". The so-called "prior commitments" of the engineers are subject to the same infirmity; they were all "subject to a complete agreement" which never came about. . . .

The Norris-LaGuardia Act has already been found to be inapplicable here. It should be noted, however, that the intervenors in any event and on this record are shown to have complied with "every obligation imposed by law" and to have made "every reasonable effort" to settle the dispute. If their efforts were frustrated, the Company has at least some responsibility because it failed to deal with the Chapter as the "true representative" of the flight engineers.

The intervenors are by their present motions in form asking for a preliminary injunction, as opposed to a final injunction after trial. But in fact there have been extensive hearings, the taking of much testimony and the reception of other evidence: it is difficult to see how a trial of the action would yield any significant further information. Under the circumstances, irreparable injury to intervenors may result unless a preliminary injunction issues at this time. The contract under which the flight engineers were employed from May 1, 1958, expired on April 30, 1963. A new contract must be negotiated. The damage to intervenors if a preliminary injunction were denied outweighs any forseeable harm to defendant or to the additional defendants; indeed defendant stated in its July 11, 1963 letter that it was prepared to bargain with the Chapter.

The motions of intervenors are accordingly granted.

American has moved for an order under Fed. R. Civ. P. 53 referring to a master the question whether its "flight deck employees desire the Joint Negotiating Committee to continue to act as their bargaining representative". It is said that this determination is "relevant" to the Company's "defense". Whatever the merits or demerits of the motion may once have been, the passage of time and the disposition of the other motions have eliminated any necessity of such relief to the Company. The motion is accordingly denied.

The foregoing opinion sets forth the finding of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

Settle orders separately as to (a) the two motions of plaintiffs, (b) the two motions of intervenors, and (c) the motion of defendant. Suggestions are invited from counsel as to the amount of security to be required of intervenors under Fed. R. Civ. P. 65(c). Settlement of the orders should be noticed for noon on Friday, August 16, 1963, or at any earlier time by which counsel for all parties will have completed submission of their papers.

Dated: New York, New York,
August 12, 1963.

INZER B. WYATT,
United States District Judge

Opinion on Motion for Summary Judgment

WYATT, District Judge.

This action was commenced on March 1, 1963 and is at issue on pleadings which have been completed, including an amended complaint of plaintiffs, filed April 12, 1963.

Motions by plaintiffs and by intervenors for preliminary injunctions, and by defendant for a reference to a master, have been determined by an opinion (with findings of fact and conclusions of law) filed earlier on this day.

The motions now before the Court are (1) a motion by plaintiffs for summary judgment in their favor under Fed. R. Civ. P. 56 (reserving the amount of damages for determination at a hearing) and (2) a motion by defendant to strike an affidavit of Charles H. Ruby, sworn to June 8, 1963, and Appendix A thereto on the ground that said affidavit and appendix (submitted in support of the motion by plaintiffs for summary judgment) violate Fed. R. Civ. P. 56(e) and General Rule 9(g) of this Court.

The additional defendants not only oppose the motion for summary judgment in favor of plaintiffs but, without formal cross-motion, request that summary judgment be entered in favor of the additional defendants.

The opinion, findings of fact, and conclusions of law earlier filed herein by the Court determine that there is no genuine issue as to any material fact, that the issues tendered by plaintiffs in their complaint are cognizable only by NMB because "the administrative remedy is exclusive" (320 U. S. at 336), and that in any event the plaintiffs have no case on the merits.

Where a motion for summary judgment has been made under Fed. R. Civ. P. 56, the District Court has authority to enter a summary judgment against the moving party even though there has been no cross-motion for summary

judgment. *Local 33, Int. Hod Carriers, etc.* v. *Mason Tenders, etc.*, 291 F. 2d 496, 505 (2d Cir. 1961). The following reasoning by Judge Medina in the cited case seems peculiarly applicable to the situation in the case at bar (291 F. 2d at 505):

> "Especially where there are several motions by the respective parties and the evidence of the facts bearing on the issues arising out of the complaint is all before the court in affidavit form, it is most desirable that the court cut through mere outworn procedural niceties and make the same decision as would have been made had defendant made a cross-motion for summary judgment."

Although the Court would grant summary judgment dismissing the amended complaint of plaintiffs on the merits, under *General Committee* v. *M-K-T Ry. Co.*, 320 U. S. 323 (1943) the proper disposition appears to be a dismissal for lack of jurisdiction over the subject matter. Accordingly, a summary judgment in favor of defendant and of the additional defendants against plaintiffs is granted and the Clerk is directed to enter judgment hereon dismissing the amended complaint of plaintiffs for lack of jurisdiction over the subject matter. As to the intervenors, their claims are directed to be severed and proceeded with separately. Fed. R. Civ. P. 21.

The motion by defendant to strike the affidavit of Charles H. Ruby, and appendix thereto, is denied.

So ORDERED.

Dated: New York, New York,
August 12, 1963.

INZER B. WYATT,
United States District Judge

Judgment of the District Court Dismissing ALPA's Complaint (August 13, 1963)

Plaintiffs having moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure and defendant having moved to strike the affidavit of Charles H. Ruby, sworn to on June 8, 1963 and appendix thereto on the ground that said affidavit and appendix is in violation of Rule 56(e) Federal Rules of Civil Procedure and General Rule 9(g) of this court, and the additional defendants, without formal cross-motion in opposition to plaintiffs' motion for summary judgment, request that summary judgment be entered in favor of the additional defendants, said motions and request having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the court thereafter having filed its Findings of Fact and Conclusions of Law and Opinion on August 12, 1963, granting summary judgment in favor of the defendant and the additional defendants dismissing the plaintiffs' amended complaint on the ground of lack of jurisdiction over the subject matter, and having denied defendant's motion to strike the affidavit of Charles H. Ruby sworn to on June 8, 1963 and appendix thereto, it is

ADJUDGED: That the defendant American Airlines, Inc. and the additional defendants, Nicholas J. O'Connell, Jr., individually and as Chairman of the Master Executive Council of the pilots in the service of American Airlines, Inc., and the Negotiating Committee of said pilots, consisting of Richard Lyons, Robert T. Guba, Joseph Garvey, Paul Atkins and Nicholas J. O'Connell, Jr., ex officio have judgment against the plaintiffs Charles H. Ruby as President of the Air Line Pilots Association, International, and Air Line Pilots Association International, an unincorporated association dismissing the amended complaint.

Dated: New York, New York,
August 13, 1963.

s/ JAMES E. VALECHE,
Clerk

Opinion, Findings, Conclusions and Order Granting ALPA's Motion for Summary Judgment

OPINION

The plaintiff, Airline Pilots Association, International, alleges that the American Airlines has violated the Railway Labor Act, in that it has interfered by coercion and undue influence with the right of its employees to choose its representative.

The plaintiff has made these charges the subject of a suit in the United States District Court for the Southern District of New York, and it argues that the National Mediation Board should be enjoined from conducting an election between it and the Allied Pilots Association until a decision is rendered by the New York Court or until the Board grants a hearing to investigate these charges.

The defendant, on the other hand, contends this Court is without jurisdiction to intervene in a representation action pending before the Board; that the Board did investigate the charges made by the plaintiff and acted within its authority in refusing to order a hearing or postpone the election; and that the dispute between the rival companies is premature for judicial determination until after the election has been held, even if the Board did act outside of its authority.

This Court is not attempting to indicate whether or not the Board conducted what might be called a thorough investigation or hearing into these charges. This Court feels that the charges pro and con have been discussed by way of the introduction of evidence at the trial in New York. Judge Wyatt now has that matter under advisement and may shortly render his opinion.

If it should develop that Judge Wyatt rules in favor of the plaintiff, it will be held in effect, as I see the matter,

that the charges of coercion and influence and any other charges, have been proven. If that occurs, the Court feels that the Board would have at least the inherent power or the right, to look into these matters further, and to conduct an investigation or hearing. Counsel for the Government has conceded in its argument that the Board in the past has conducted hearings.

In this connection, the Court will quote the language of Judge Fahy in the case of WES Chapter, Flight Engineers International Association, AFL-CIO versus the National Mediation Board, 314 F. 2d 234.

> "The second question must be decided in a similar manner. The Association charged that SOA was assisted and dominated by the employer in violation of section 2, Third and Fourth, of the Act. The Board held a hearing on these charges, taking pertinent testimony but declining, because of lack of power, to compel attendance of certain witnesses requested by the Association. The Statute, in Section 2, Ninth, requires an 'investigation' of such disputes; and the Board, it seems to us, did investigate. In a different case, where, for example, a stronger showing is made initially by the charging party than was made here, the Board might be required to make a more independent investigation into a charge of company assistance to an opposing union seeking certification."

The Court is familiar with the case of *Switchmen's Union* v. *National Mediation Bd.*, 320 U. S. 297 (1943), which was discussed during argument. The Court, however, feels that, if the New York Court decides in favor of the plaintiff, and this election is not enjoined at this time, irreparable injury and damage might result to the plain-

tiff. If any influence or coercion was used, it might carry over and affect this election in some way.

Therefore, the motion of the plaintiff for summary judgment is granted and the cross-motion of defendant for summary judgment is denied.

Counsel will prepare an appropriate order.

JOHN J. SIRICA
United States District Judge

August 7, 1963

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff Air Line Pilots Association, International, is a labor organization within the meaning of Section 1, Sixth of the Railway Labor Act. Plaintiff Charles H. Ruby is President of the Air Line Pilots Association, International.

2. The National Mediation Board is an administrative agency created pursuant to Section 4 of the Railway Labor Act with powers and duties set forth in the Railway Labor Act. Defendant Leverett Edwards is Chairman of the National Mediation Board, defendant Francis A. O'Neill, Jr., is a member of the National Mediation Board, and defendant Howard G. Gamser is a member of the National Mediation Board.

3. Plaintiffs charge that American Airlines has violated the Railway Labor Act in that it has interfered with the right of its employees to choose its representative and have made this charge the subject of a suit in the United

States District Court for the Southern District of New York, identified as No. 63 Civ. 585.

4. Plaintiffs have brought the present action to enjoin the National Mediation Board from conducting an election to determine whether plaintiffs or Allied Pilots Association shall represent the pilots and co-pilots of American Airlines until a decision is rendered by the District Court for the Southern District of New York or until the Board grants a hearing to investigate these charges. The aforesaid action in the District Court for the Southern District of New York has been heard by Judge Inzer B. Wyatt and he has indicated that a decision in that case will be handed down in the near future.

5. There is now pending before the National Mediation Board an application made by the Allied Pilots Association, known and designated in the files of that Board as Case No. R-3719, for an election and certification as representative of the Pilots employed by American.

6. Unless enjoined, the National Mediation Board intends to conduct an election forthith pursuant to such application, and to issue a certification based thereupon.

7. Plaintiffs' charges having been submitted to the District Court for the Southern District of New York, no finding is made as to whether or not the Board conducted a through investigation into plaintiffs' charges.

8. The conduct of an election by the Board before the District Court for the Southern District of New York has handed down its decision in the action identified as No. 63

Opinion, Findings, Conclusions and Order Granting ALPA's Motion for Summary Judgment

Civ. 585 might result in irreparable injury and damage to plaintiffs should that court decide in plaintiffs' favor in that action.

Conclusions of Law

1. This action arises under the Railway Labor Act (45 U. S. C. 151, et seq.) and the Court has jurisdiction of this action under 28 U. S. C. Sections 1331 and 1337.

2. Plaintiffs in this proceeding might suffer irreparable injury if the National Mediation Board holds an election before the determination of the United States District Court for the Southern District of New York in 63 Civ. 585 if the New York Court decides that there has been coercion and undue influence at some time before the election, and in that event, the Board would have the inherent power or right to look into these matters further and to conduct an investigation or hearing.

3. The National Mediation Board should be enjoined from conducting a representation election among the craft or class of pilots and co-pilots of American Airlines until the handing down of a decision in the action identified as 63 Civ. 585 in the United States District Court for the Southern District of New York.

JOHN J. SIRICA
United States District Judge

August 10, 1963

* * *

The action came on for hearing before the Court, Honorable John J. Sirica, District Judge presiding, and the issues having been duly heard on motion for summary

judgment by plaintiffs and cross-motion for summary judgment or, in the alternative, for an order dismissing the complaint by defendants, and a decision having been duly rendered, it is this 10th day of August 1963

ORDERED: That the defendants, and each of them, be, and they are, hereby enjoined from conducting a representation election among the craft or class of pilots or co-pilots of American Airlines pending the announcement of a decision by the District Court in the action identified as No. 63 Civ. 585 now pending in the United States District Court for the Southern District of New York.

JOHN J. SIRICA
United States District Judge

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

MEMORANDUM AND ORDER

This matter comes before the Court on a motion by the plaintiff, Air Line Pilots Association, to amend the Findings of Fact and Conclusions of Law entered by Judge Sirica on August 10, 1963. Specifically, the motion goes to that part of the order which enjoined the National Mediation Board from conducting a representation election among the pilots and co-pilots of American Airlines until "the announcement of a decision by the District Court in the action identified as No. 63 Civ. 585. . . ." in the Southern District of New York.

A decision was rendered in that case by Judge Wyatt on August 12, 1963.

This motion requests that the injunction be extended until the matter is finally determined in the United States Court of Appeals for the Second Circuit. That Court has advanced the case for hearing to September 3, 1963.

The principal question in the case heard on the merits by Judge Wyatt was whether there had been violations of the Railway Labor Act, such as carrier interference, influence, coercion or assistance of a rival union. That court, in effect, disposed of the question by ruling that the National Mediation Board has the exclusive jurisdiction as to whether there has been influence, coercion or assistance by the carrier. See the Opinion in 63 Civ. 585, United States District Court, Southern District of New York, August 12, 1963, p. 59.

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

The court further held that "There is no showing of influence or coercion on the part of the company nor any unlawful assistance by the company in the breakaway from Alpa (Airline Pilots Association) and in the organization of Allied (the rival union)." Supra at 60-61. However, the court predicated the decision on the ground of lack of jurisdiction over the subject matter.

Plaintiff now urges this Court to extend the injunction against the National Mediation Board to prevent the representation election from proceeding. Counsel for plaintiff urges that the question of coercion was improperly decided by the District Court in New York and should the Second Circuit reverse, plaintiff's rights will have been extinguished by the election. The National Mediation Board intends to proceed immediately with the election.

Even if this Court would concede that the decision should be reversed on appeal, and, certainly conceding that a reversal will be to no avail if the election has been held; this Court will not nullify the effect of the decision by the District Court in New York by extending the injunction.

It should be noted that Judge Sirica had the alternative positions before him when he entered his order on August 10, 1963. He, at that time, rejected plaintiff's request to continue the injunction until "final determination" of the New York action; and, adopted, instead, the order submitted by the defendants which enjoined the election "pending the announcement of a decision by the District Court in the action identified as No. 63 Civ. 585 . . .".

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

This Court will not enlarge upon this order entered on August 10, 1963 to extend the injunction until the Second Circuit Court of Appeals renders a decision.

The Court notes, however, that the New York Court ruled that the National Mediation Board has exclusive jurisdiction over the question of company interference. But, the National Mediation Board has stated that they have no jurisdiction in this case to pass upon any alleged issues of interference that are committed prior to the conduct of the election. In an affidavit, Mr. Thomas A. Tracy, Assistant Executive Secretary of the Board, stated the following:

> "It has been the consistent position of the National Mediation Board since its creation under the 1934 Amendment to the Railway Labor Act, that this Board has no legal authority to investigate and pass upon charges of carrier interference, assistance, influence and coercion in connection with representation of carrier employees, except to take the necessary steps to see that the actual election procedures be free from such actions by the carrier."

The proper forum for determination of the issue of carrier interference would appear to be the National Mediation Board. Counsel for defendant asserts that the Board has conducted an "adequate investigation." It is not clear to this Court what comprises an adequate investigation in the absence of a formal hearing, or, when the parties are

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

not accorded the opportunity of presenting evidence of interference.

Thus we have a situation in which the complaining party, ALPA, has no forum for hearing or redress if the wrong did, in fact, occur. Even so, such a conflict will not permit this court to act in an appellate capacity. We will stay the impending election only until such time as this motion can properly be brought before the United States Court of Appeals.

Accordingly, it is this 19th day of August, 1963,

ORDERED, that plaintiff's motion to amend the findings of fact, conclusions of law and order or judgment of the Court under Rule 52(b), be, and the same hereby is, denied; and

IT IS FURTHER ORDERED, that the defendant be, and hereby is, restrained from proceeding with the election among the pilots and co-pilots of the American Airline for a period of 48 hours from the filing of this Order.

LEONARD P. WALSH, Judge

Counsel:

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For Plaintiffs

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

Howard E. Shapiro, Esq.
Harland F. Leathers, Esq.
Department of Justice
For Defendants

This matter comes before the Court on an oral motion made by Counsel for the Plaintiff, Air Line Pilots Association, to amend the Memorandum and Order entered this 19th day of August, 1963, whereby the Court ordered that the National Mediation Board be restrained from proceeding with an election among the pilots and co-pilots of American Airlines for a period of 48 hours from the filing of this Order and it further appearing to the Court that counsel for ALPA is advised by the Clerk of the Court of Appeals that a motion that ALPA will file for an injunction or stay pending appeal will be heard by a panel on Thursday, August 22, 1963, it is by this Court this 19 day of August, 1963,

ORDERED that the Memorandum and Order entered this day is amended, and the National Mediation Board is restrained from proceeding with the election among the pilots and co-pilots of the American Airlines until the panel in the Court of Appeals assumes jurisdiction of the motion of ALPA to issue an injunction or stay order pending the appeal.

LEONARD P. WALSH, Judge

Railway Labor Act

1. Railway Labor Act, Act of May 20, 1926, 44 Stat. 577 as amended, 45 U. S. C. § 151 et seq.

Section 2, Third:

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth:

> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency

of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representatives of the craft or class for the purposes of this Act. In such an investigation, the Mediation

Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without inference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

2. RULES AND REGULATIONS OF THE NATIONAL MEDIATION BOARD:

Section 1203.2:

"Section 1203.2 Investigation of Representation Disputes.—Applications for the services of the National Mediation Board under section 2, Ninth, of the Railway Labor Act, to investigate representation disputes among carriers employees may be made on printed forms N. M. B. 3 copies of which may be secured from the Board's Secretary. Such applications and all correspondence connected therewith should be filed in duplicate and the applications should be accompanied by the signed authorization cards from at least a majority of the employees com-

posing the craft or class involved in the dispute. The applications should show specifically the name or description of the craft or class of employees involved; the name of the invoking organization, the name of the organization currently representing the employees, if any, the estimated number of employees in each craft or class involved, and the number of signed authorizations, submitted from employees in each craft or class. The applications should be signed by the chief executive of the invoking organization or other authorized officer of the organization. These disputes are given docket numbers in series 'R'."

Section 1206.2:

"Section 1206.2 Percentage of Valid Authorizations Required to Determine Existence of a Representation Dispute.—(a) Where the employees involved in a representation dispute are represented by an individual or labor organization, either local or national in scope, and are covered by a valid existing contract between such representative and the carrier, a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least a majority of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

(b) Where the employees involved in a representation dispute are unrepresented, a showing of proved

authorizations from at least thirty-five (35) percent of the employees in the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act."

Resolution of American Airlines Master Executive Council—January 8-11, 1963 Meeting

WHEREAS, there is a difference of opinion between the AAL-MEC and the Executive Committee regarding the present AAL Pilots' negotiations, and

WHEREAS, the Executive Committee has caused the AAL negotiations to be discontinued until such time as the AAL pilots agree to negotiate a commercial license and instrument rating as a requirement before operating three man jet crews, and

WHEREAS, the AAL-MEC is of the opinion that this is *not* a mandatory requirement under present ALPA policy, and

WHEREAS, the AAL pilot group has no intention of giving up demands regarding reductions in flight time and duty formulas that have been successfully negotiated, and

WHEREAS, the AAL Flight Engineers have indicated their unanimous desire to conclude and implement a crew complement solution, a merger with the AAL pilots, which would result in one union in the cockpit, and a single contract covering all flight deck operating crew members on AAL,

WHEREAS, AAL management has expressed a willingness to conclude an agreement with the pilots and engineers and to implement such a contract if the majority of the pilots and engineers on AAL so desire,

THEREFORE BE IT RESOLVED, that the AAL-MEC, speaking for the entire AAL pilot group, goes on record as authorizing the AAL Negotiating Committee to conclude a contract

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and further to advise AAL management that the AAL pilots are agreeable to implementation of said contract with or without formal approval of the ALPA.

BE IT FURTHER RESOLVED, that the AAL Master Chairman be instructed to relay this information to the AAL management immediately.

BE IT FURTHER RESOLVED, that the position of the AAL MEC shall be made known to the President of the Association and to the Executive Committee at the joint session to be held on January 9, 1963.

Allied's Petition to Mediation Board for Investigation of Representation Dispute

NATIONAL MEDIATION BOARD

APPLICATION FOR INVESTIGATION OF REPRESENTATION DISPUTE

TO THE NATIONAL MEDIATION BOARD,
Washington, D. C.

A dispute has arisen among the employees of American Airlines, Inc. as to who are the representatives of these employees designated and authorized in accordance with the requirements of the Railway Labor Act. The undersigned, one of the parties to the dispute, hereby requests the National Mediation Board to investigate this dispute, and to certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth, of the Act.

Allied's Petition to Mediation Board for Investigation of Representation Dispute

PARTIES TO DISPUTE

ALLIED PILOTS' ASSOCIATION
(Petitioning organization or representative)

AIR LINE PILOTS ASSN. INTL.
(Organization holding existing agreement, if any, and date thereof)

NONE
(Other organizations or representatives involved in dispute)

CRAFT OR CLASS OF EMPLOYEES INVOLVED

Pilots and Copilots	1,600	1,130

EVIDENCE OF REPRESENTATION

The evidence of representation has been forwarded under separate cover and consists of Authorization Cards.

Signed at Washington, D. C. this 24th day of April, 1963.

s/ NICHOLAS J. O'CONNELL, JR.,
Title Acting President.